

MEETING  
STATE OF CALIFORNIA  
HEALTH AND HUMAN SERVICES AGENCY  
DEPARTMENT OF HEALTH SERVICES  
FORENSIC ALCOHOL REVIEW COMMITTEE

DEPARTMENT OF HEALTH SERVICES  
RICHMOND CAMPUS CONFERENCE CENTER  
850 MARINA BAY PARKWAY  
AUDITORIUM  
RICHMOND, CALIFORNIA

THURSDAY, AUGUST 25, 2005

10:00 A.M.

JAMES F. PETERS, CSR, RPR  
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PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

APPEARANCES

REVIEW COMMITTEE MEMBERS

Mr. Paul Kimsey, Ph.D., Chairperson

Ms. Patricia Lough

Mr. Bruce Lyle

Mr. Paul Sedgwick

Ms. Laura Tanney

Mr. Kenton Wong

Mr. Torr Zielenski

STAFF

Dr. Larry Barrett, Chief, Division of Food, Drug and  
Radiation Safety

Ms. Goldie Eng, Senior Staff Counsel

Mr. Clay Larson, Chief, Abused Substances Analysis Section

Ms. Cathy Ruebusch, Regulations Coordinator

Dr. Mary Soliman, Chief, Food & Drug Laboratory Services

FACILITATOR

Ms. Selma Abinader

ALSO PRESENT

Ms. Gail Heuer, Senior Staff Counsel, Department of Motor  
Vehicles

Dr. Nikolas Lemos, Chief Medical Examiner Toxicology Lab,  
San Francisco

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APPEARANCES CONTINUED

ALSO PRESENT

Mr. Bill Phillips, California Department of Justice

Ms. Halle Weingarten, Forensic Toxicologist

Mr. Jeff Zehnder, Drug Detection Lab of Sacramento

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## 1 PROCEEDINGS

2 FOOD, DRUG AND RADIATION SAFETY DIVISION CHIEF

3 BARRETT: Good morning. My name is Larry Barrett. I'm  
4 Chief of the Division of Food, Drug and Radiation Safety  
5 of the California Department of Health Services, and I  
6 would like to welcome you this morning to the first  
7 meeting of the Forensic Alcohol Review Committee.

8 This Committee was established last year by  
9 Senate Bill 1623. It has 8 members. And the members  
10 represent various areas, including prosecuting attorneys,  
11 law enforcement agencies, defense attorneys, coroners,  
12 criminalists, toxicologists, crime laboratory directors,  
13 and the Department of Health Services.

14 I would like to thank each of you for agreeing to  
15 participate in this committee. As Committee members you  
16 are responsible for proposing changes to the Department's  
17 regulations establishing -- for determining blood alcohol  
18 concentrations of individuals involved in traffic  
19 accidents or violations.

20 Accurate and reliable blood testing of drunk  
21 drivers is important to public health. Each year there  
22 are over 1,500 Californians killed in traffic accidents.  
23 In addition, another 30,000 are injured. When individuals  
24 drive in California they automatically give their consent  
25 for testing of blood alcohol levels. Each year there are

1 over 200,000 driving arrests in California.

2 In this State it's unlawful to drive with a blood  
3 alcohol level of above .08 percent. At .07 percent it's  
4 considered not unlawful. With this in mind, it's critical  
5 that we have good laws and regulations in place.  
6 California and other states take this very seriously,  
7 because we want to ensure that drunk drivers are  
8 convicted, but we also want to ensure that someone is not  
9 convicted unjustly.

10 The Department of Health Services is responsible  
11 for the regulation of forensic alcohol analysis. The  
12 goals of the program are to help ensure the competency of  
13 forensic alcohol laboratories, the qualifications of the  
14 employees in those laboratories and the accuracy of breath  
15 testing procedures used by law enforcement agencies.

16 As members of the Forensic Alcohol Committee your  
17 support for this important public health initiative is  
18 appreciated. So thanks again for your participation.

19 And I would like to now introduce you to Dr. Paul  
20 Kimsey who will serve as the Chair for today's meeting.

21 Thank you.

22 CHAIRPERSON KIMSEY: Good morning. I'm Paul  
23 Kimsey. And I'll introduce myself a little bit and we'll  
24 go around the Committee and have you introduce yourselves.

25 I'm the Assistant Deputy Director for Laboratory

1 Science in the Department of Health Services. And I'm  
2 also the State Public Health Laboratory Director. And as  
3 a consequence of being the State Laboratory Director, I  
4 have quite a bit of oversight responsibility for this  
5 facility, which is new. We just moved into in the last  
6 few years and we'll be finished moving here by the middle  
7 of September.

8           As Assistant Deputy Director for Laboratory  
9 Science, I oversee the 2 divisions that license both  
10 clinical laboratories and environmental laboratories in  
11 the state. There are over 16,000 clinical laboratories  
12 and a little under 800 environmental laboratories, which  
13 we certify and regulate in the state. So I have a bit of  
14 a background in laboratory oversight. And that was why  
15 the Department has asked me to participate and at least  
16 chair this meeting today.

17           And I'd also, as we go around, I'd like to have  
18 us, besides introducing ourselves, a little bit -- sort of  
19 talk -- or mention a little bit what you hope to get out  
20 of the meeting today and the process.

21           And myself I hope I'd have, and we all have, a  
22 better understanding of what our responsibilities are  
23 going to be and have an outline of how we're going to do  
24 that work, because this is not an area that I currently am  
25 involved with in the Department. And I'm going to be

1 learning a lot more. So I'm hoping to establish a process  
2 and understanding of what our responsibilities are by the  
3 end of the day.

4 So, Bruce, would you like to introduce yourself.

5 COMMITTEE MEMBER LYLE: My name is Bruce Lyle.  
6 I'm the Assistant Chief Deputy Coroner of the Orange  
7 County Sheriff's Coroner's Department. I don't know what  
8 to say about myself. I've been in the field for a long  
9 time. I'm here at the table representing the California  
10 State Coroner's Association. So I'll keep that in mind as  
11 we go, what the interests of the whole state is.

12 And what I'm hoping to derive from today and  
13 eventually from the whole process is to just ensure that  
14 as an end user as a representative of the end users of  
15 toxicology, and it's not necessarily the breath analysis  
16 but more most port-mortem toxicology. We rely on that  
17 pretty heavily. And our coroner's goals are always for  
18 accuracy, completeness and promptness. And I want to keep  
19 that in mind and make sure that the process ensures those  
20 things.

21 COMMITTEE MEMBER SEDGWICK: I'm Paul Sedgwick. I  
22 was nominated by the California Association of  
23 Toxicologists. And just a little about myself. I've been  
24 in the business for 35 years plus some time in Indiana.  
25 I'm a Diplomate of the American Board of Forensic



1 Toxicology. And I'm on the Proficiency Review Committee  
2 of the American Society of Crime Lab Directors Laboratory  
3 Accreditation Board for toxicology and alcohol.

4           Among the things that I hope to complete here is  
5 I would like to keep the spirit the Title 17 as it was  
6 originally written. It was very necessary and it does  
7 very good things. I would like to encourage good and  
8 hopefully better laboratory practice to give as accurate a  
9 result as possible with easy access to all the records  
10 that document the analysis.

11           And keeping in mind that the criminal justice  
12 system, as represented by our 2 attorney members, is, has  
13 always been and will continue to be the final arbiter of a  
14 good result. I would also like to see a reorganization  
15 and clarification of Title 17 to assist the attorneys in  
16 asking the appropriate questions and to let them know what  
17 answers to expect from those questions.

18           COMMITTEE MEMBER LOUGH: Patricia Lough  
19 Supervising Criminalist, San Diego Police Department, now  
20 retired. I'm here representing the California Association  
21 of Crime Laboratory Directors.

22           I agree with everything Paul said. The  
23 information I'm prepared to talk about today regarding my  
24 expectations are maybe pointed in a little bit different  
25 direction. It's been about 9 months since the legislation

1 was in effect, and I would like to see speedy revisions of  
2 Title 17 made. It is a concern to crime laboratories.  
3 I'd like to target the end of this year. And that  
4 probably is speedy, but I think we could do it.

5 I'd like to see that we complete the intent of  
6 the legislation for Senate Bill 1623. I'd like to see the  
7 practices updated and approved by the general forensic  
8 science community put in place, and eliminate the  
9 redundancy of State oversight of forensic alcohol  
10 analysis.

11 And second, as we -- it is on our agenda, at  
12 3:15, to establish how this committee is going to operate.  
13 I'd like to establish a rigorous schedule to make sure  
14 that we can complete the process as soon as possible and  
15 perhaps quickly determine the areas of agreement, so we  
16 only have to concentrate on those areas of disagreement.

17 I'm happy to be here today.

18 COMMITTEE MEMBER WONG: Hello. My name is Kenton  
19 Wong and I represent the California Association Of  
20 Criminalists. Patty Lough and I have worked extensively  
21 on Senate Bill 1623, and I'd like to echo the same  
22 sentiments as Paul Sedgwick and Patty Lough.

23 I think that these revisions are long overdue. I  
24 think there will be many areas of comment around that we  
25 agree on, that need amendment and revision. And I agree

1 with Patty that hopefully there will be minimal areas that  
2 we have disagreement on that we can hammer out and move  
3 forward.

4 COMMITTEE MEMBER ZIELENSKI: My name is Torr  
5 Zielenski. I am currently a supervising attorney with the  
6 misdemeanor trial section in Sacramento. I represent the  
7 California Public Defenders Association.

8 And I, too, echo Mr. Sedgwick's concerns about  
9 Title 17. It would be our desire to have accurate and  
10 reliable testing, so that the certainty of whatever  
11 verdicts come from juries is assured.

12 Additionally, I'd like to see, if possible, more  
13 weight given to the impact of Title 17, because most of  
14 the time Title 17 infractions, violations or noncompliance  
15 is treated by the Court as just something that is, for the  
16 most part, insignificant. Most of the courts will allow  
17 the evidence to come in even if there's been a violation  
18 of Title 17 and the ruling often time goes to the weight.  
19 And to ensure the quality of the process, it would be  
20 important, and I'd like to see, that violations of Title  
21 17 actually had some net effect where counsel is  
22 important.

23 COMMITTEE MEMBER TANNEY: Laura Tanney. I'm a  
24 Deputy District Attorney in the County of San Diego. I'm  
25 a representative here of the California District Attorneys

1 Association. I've been a Deputy District Attorney for  
2 about -- approximately 16 years. I've handled numerous  
3 driving under the influence cases as well as vehicular  
4 manslaughter cases involving the use of alcohol.

5 I'm here today -- I'm also incidentally on the  
6 Legislation Committee of the California District Attorneys  
7 Association and the Legislative Coordinator for the San  
8 Diego County District Attorney's Office.

9 I'm here today to again find out what the  
10 responsibilities are of this Committee and how we can best  
11 put those responsibilities into practice and develop  
12 regulations that do -- that do direct the accurate and  
13 reliable testing of forensic alcohol samples. I'm looking  
14 for efficiency, but also quality of those results, so that  
15 the integrity of the evidence is preserved so that it can  
16 be used in the prosecution of cases.

17 CHAIRPERSON KIMSEY: Thank you. I've gotten a  
18 note that Sergeant Ray Cardona is not going to be able to  
19 join us today. And before I turn it over to our  
20 facilitator, I'd like to talk a little bit about sort of  
21 how the building operates.

22 A number of you may have seen that there are  
23 restrooms. As you go out of the auditorium straight back,  
24 there's rest rooms on the right and left. There's a  
25 cafeteria to the right. I would recommend that -- we're

1 actually quite pleased with the cafeteria, a little  
2 surprised. But very pleased with the cafeteria. It's  
3 food -- and I would recommend that you have lunch there.  
4 Getting in and out of security takes some time, and we may  
5 be able to have some discussions. There is a couple of  
6 sort of small like small cafe and a sandwich shop just  
7 directly across the street that you can walk to. There is  
8 an Italian restaurant, Saluté, down at the harbor, which  
9 is about a mile and a half drive, if you're interested.

10 Obviously, there's a little bit more security  
11 here than we've had in some of our other facilities. Be  
12 careful which doors you go out, you may not be able to get  
13 back in without a badge. So talk to me or an employee if  
14 you need to have a cigarette break or you want to walk  
15 around outside.

16 I think that's the majority of the housekeeping  
17 issues. We do have some breaks scheduled, but I don't see  
18 one before lunch at this point. So we might have a break  
19 before lunch, but it's 10 to now, we'll see how it works.

20 But without any other further announcements, we  
21 look forward to having Selma here today to sort of help us  
22 walk through the agenda, keep us on time. And I'd like to  
23 introduce Selma Abinader. And, Selma, if you'd like to  
24 take over.

25 FACILITATOR ABINADER: Good morning. Welcome

1 Committee Members, and I'd like to also welcome the public  
2 that are here today.

3 I just want to spend a few moments going over the  
4 agenda and talking a little bit about the process today.  
5 And it was very helpful to hear what people said what  
6 their hope was for the process. Because I think the way  
7 that the agenda has been structured, hopefully at the end  
8 of the day, we'll be able to really identify what this  
9 committee sees as the most important things to focus on in  
10 terms of the new law, and really determine a process to  
11 move forward on that, so that we're not, you know,  
12 spending a lot of time doing things that are already okay  
13 or people feel have a lower priority in the whole need to  
14 move forward on developing the regulations.

15 So I think about this meeting agenda today in  
16 hoping to achieve 3 different outcomes. One is really  
17 making sure that we're all understanding what the process  
18 is about developing regulations of this type, and also  
19 kind of the legal issues that surround that. So I call  
20 this morning's session about laying the foundation, so we  
21 all have the common information about the things that  
22 really drive and have an impact on the work that you're  
23 going to be doing.

24 Everybody, by the way, has an agenda in their  
25 packets, so that's why I'm reviewing at this moment.

1           We're also going to spend some time this  
2   afternoon, after lunch, hearing about what the program  
3   currently entails. So there will be a presentation of  
4   what the current program looks like, a review of the new  
5   law, and then we're going to spend some time in a  
6   facilitated session really talking about the implications.

7           So, hopefully, what we'll be doing is being able  
8   to identify the scope of the work together -- our work  
9   together and also identifying where you want to focus your  
10  efforts as you meet over the next few months, and  
11  hopefully by the end of December are able to complete your  
12  work as Patty had said in her opening statements.

13          So if we were to look at the agenda, we're at the  
14  session that's called Opening Remarks and Discussion of  
15  the Committee Meeting Agenda. We're going to have a  
16  presentation by Goldie Eng after I'm done with the review.  
17  And she's going to review the legal responsibilities. And  
18  then Cathy Ruebusch is going to talk about the regulation  
19  development process and standards.

20          Both these folks will be consultants to this  
21  group as you go through your process. So you'll hear  
22  information from them today. But as my understanding is,  
23  that they'll be available to the Committee throughout the  
24  process of developing regulations. So I think that's very  
25  fortunate to have both those folks involved.

1           Then we'll have lunch. As Paul had stated, folks  
2 can go to the cafeteria or there's places outside the  
3 building to go to lunch, and that will be an hour from  
4 11:30 to 12:30. And then when we come back Mary Soliman,  
5 Dr. Soliman and Clay Larson will give us a presentation of  
6 the current activities. And you have a worksheet in your  
7 folder on the right-hand side in the back that they're  
8 going to be using during their presentation that really  
9 gives you a nice overview of the current activities and  
10 also what the law says in relationship to the activities  
11 that are presently taking place.

12           Then we're going to go into a facilitated  
13 discussion, where we're really going to begin to identify  
14 what are the implications when we're moving from something  
15 what currently is to being able to move toward  
16 implementing this new law, what are the implications, what  
17 are the priorities, what do we really need to focus our  
18 efforts on?

19           So that will take place as a facilitated activity  
20 in the afternoon. And once we're able to identify where  
21 you want to prioritize your efforts, then if we have some  
22 time we'll get to work. We'll spend some time talking  
23 about governance issues. And I think one of you brought  
24 up wanting to really know what the process is, the whole  
25 issue about how you're going to work together as a



1 committee. We'll be addressing that during the governance  
2 and meeting process section. And then together we'll  
3 outline the next steps and schedule the future meetings.

4 So how does that sound?

5 Sound good?

6 All right, great.

7 And so as the facilitator, I'm really here to do  
8 that, facilitate. I'm not the content expert. I'm here  
9 to just ensure that the process moves forward and really  
10 support your efforts in the afternoon to move forward and  
11 identify the way you're going to work together and what  
12 you're going to focus on.

13 Thank you.

14 CHAIRPERSON KIMSEY: And now we're going to have  
15 a presentation from Goldie Eng. She's our Senior Staff  
16 Counsel at the Office of Legal Services, Department of  
17 Health Services. She's going to review the legal  
18 responsibilities.

19 SENIOR STAFF COUNSEL ENG: Thank you. Good  
20 morning. First, I'd like to review the legislation that  
21 brought about this Committee. SB 1623 was enacted last  
22 year and has been -- as you know, the Bill eliminated the  
23 Forensic Alcohol Laboratory Licensing Program. And now  
24 the -- and also many of the specific requirements  
25 associated with it, such as inspections.

1           However, the law did require that forensic  
2 alcohol laboratories continue to comply with existing  
3 regulations until such time as these regulations are  
4 revised by the Department. And this Committee is an  
5 integral part of that process.

6           And now the -- with the elimination of the  
7 licensing program, the focus of the program is now on the  
8 regulations and also the work of this Committee.

9           I'd like to review the section about 1623, which  
10 talks about the Committee. The Legislature required the  
11 Department to establish this Committee, and that the  
12 Committee would have 8 members with various  
13 representatives of different backgrounds in the forensic  
14 alcohol area, including Department of Health Services.  
15 And the Committee is required to meet once every 5 years  
16 or within 60 days of the receipt of a request by the  
17 Department from a committee member.

18           And the Committee is charged with reviewing  
19 existing forensic alcohol laboratory regulations, and to  
20 determine revisions to those regulations, which will, and  
21 I quote, "...limit those regulations to those that the  
22 Review Committee determines are reasonably necessary to  
23 ensure the competence of the laboratories and employees to  
24 prepare, analyze and report the results of the tests and  
25 to comply with applicable laws."

1           Then after it comes up with those revisions, the  
2 Committee is required to submit a summary of those  
3 revisions to the California Health and Human Services  
4 agency, which is the agency above the Department of Health  
5 Services. Within 90 days of receiving those revisions,  
6 the Health and Human Services Agency may disapprove one or  
7 more of those revisions.

8           After that 90-day period, the Department is  
9 required to adopt those regulations, which incorporate the  
10 Committee's revisions except those revisions which were  
11 disapproved by the agency.

12           Because this Committee was required to be  
13 established by the Legislature and required to meet  
14 regularly, it comes under the requirements of the  
15 Bagley-Keene Open Meeting Act, which covers state bodies.  
16 And those provisions are found in Government Code sections  
17 11120 to 11132, and all of the Committee members should  
18 have received copies of the Bagley-Keene Open Meeting Act,  
19 along with a copy of the Attorney General's guide to the  
20 Bagley-Keene Act.

21           Basically, the Act requires State bodies to meet  
22 3 requirements in 3 areas. First, is to provide public  
23 notice of meetings and to prepare agendas.

24           Second, to accept public comment.

25           And third, to conduct meetings in public, except

1 as allowed to conduct closed sessions in limited  
2 circumstances.

3           Operating under the Bagley-Keene Open Meeting Act  
4 requirements can be frustrating and inefficient. But I  
5 think we can understand the process better if we consider  
6 the value judgments that were made by the Legislature when  
7 it required the establishment of this Committee.

8           If the primary objective of the decision making  
9 relating to regulations was efficiency, the Legislature  
10 would have assigned this process to the Department of  
11 Health Services and let the Director of the Department  
12 make the decisions.

13           But in choosing to create a multi-member  
14 committee, the Legislature made a judgment that the  
15 decisions revising these regulations would be made by  
16 yielding the consensus. And that it specifically created  
17 the Committee with 8 members from different backgrounds,  
18 different view points, different experiences, and to build  
19 this consensus through give and take, debate,  
20 deliberation, and it's a more time-consuming process. But  
21 that judgment was made that it was worth it. This is what  
22 we need to revise these regulations.

23           And that leads into the importance of the work  
24 that the Committee will be doing this afternoon, which  
25 will be coordinated by Selma Abinader. I think if we

1 understand these value judgments, which led up to the  
2 creation of this Committee, we'll better understand that  
3 the Legislature is mandating that the Government use a  
4 consensus building model in terms of decision making  
5 instead of the individual decision-making part.

6           And also by enacting the Bagley-Keene Open  
7 Meeting Act and having this Committee be a state body  
8 under that Act, when the Committee meets to develop this  
9 consensus, there needs to be public participation, there  
10 needs to be a seat at the table, so to speak, for the  
11 public to allow the public to monitor the decision-making  
12 process and to participate in that process.

13           And I think if we understand these value  
14 judgments, we'll be able to accept some of the  
15 inefficiencies that this process entails. And we realize  
16 that that was a trade off for the benefit of greater  
17 participation in government.

18           Now, I'd like to review some of the highlights of  
19 some of the requirements of the Bagley-Keene Act. First  
20 of all, the Bagley-Keene Act covers the activities of  
21 State bodies, and that is defined as, "A multi-member body  
22 created by statute or required by law to conduct official  
23 meetings."

24           And a meeting is defined in the Act, "As any  
25 congregation of a majority of the members of the State

1 body at the same time and place to hear, discuss or  
2 deliberate on any item that is the subject matter of the  
3 Committee."

4 And the law prohibits the use by the majority of  
5 the members, which is the equivalent of a quorum either by  
6 direct communications, meeting, teleconferencing through  
7 personal intermediaries or technological devices such as  
8 E-mail.

9 There are several exemptions from this definition  
10 of a meeting. And all of these exemptions are provided  
11 that the majority of the members do not discuss committee  
12 business among themselves. And some of the exceptions are  
13 individual contacts or conversations between a committee  
14 member and a member of the public, attendance by committee  
15 members at a conference where issues of general interest  
16 to the public are discussed, open and publicized meetings  
17 to address the topic of state concern, open and noticed  
18 meetings of another state body or legislative body,  
19 attendance at a purely social or ceremonial occasion, and  
20 lastly attendance of a majority of the members at an open  
21 or noticed meeting of a standing committee of that. That  
22 would refer to a subcommittee of this Committee.

23 And the non-committee members, if they do attend  
24 that subcommittee meeting, are required to attend only as  
25 observers, meaning that they cannot participate in the

1 subcommittee discussions or ask questions.

2           A subcommittee, which in the legislation is also  
3 referred to as an advisory body, is a body of 3 or more  
4 persons created by the governing committee, that is this  
5 Committee. And this subcommittee, and it doesn't matter  
6 what it's -- what the title is, a subcommittee, task  
7 force, workgroup, it's considered a subcommittee. And  
8 subcommittees of over 2 committee members are required to  
9 comply with the Bagley-Keene Open Meeting Act.

10           Committees that have less than 3, let's say 2  
11 members, are not covered -- not required to comply with  
12 the Open Meeting Act. But if there is a meeting of a  
13 subcommittee with less than 2 members, it would -- it  
14 should not be attended by more than those 2 subcommittee  
15 members. Otherwise, that would push the attendance up to  
16 -- beyond 2, and then it would be -- it would trigger the  
17 Bagley-Keene Open Meeting Act requirements.

18           I'd like to talk now about notice. For committee  
19 meetings, it requires at least 10 calendar days written  
20 notice for each meeting. And the notice must be posted on  
21 the Internet. There must be an agenda prepared, which  
22 must include all items of business to be transacted or  
23 discussed at the meeting, and no item must be added to the  
24 agenda subsequent to the provision of this notice. There  
25 are some specific exemptions to this 10-day notice

1 requirement, but that is the general rule.

2           However, if the agenda is amended prior to the  
3 start of that 10-day period, then there -- that would be  
4 acceptable because that 10-day notice period is still  
5 being -- requirement is still being met.

6           And the items which are not on the agenda are not  
7 to be -- may not be discussed, even if no action is taken  
8 by the Committee. Because even a discussion of those --  
9 of that subject matter is of a concern to -- under the  
10 Bagley-Keene Open Meeting Act, because the public has a  
11 right to also monitor the discussions and the input that  
12 is presented to the Committee.

13           Areas that -- subject matter that is not on the  
14 agenda, but is brought up may be discussed sufficiently to  
15 put that item on the agenda for the next meeting. So that  
16 is one way to deal with areas that are not on the agenda,  
17 either raised by committee members or by members of the  
18 public.

19           Subcommittee meetings are also required to -- are  
20 required to provide notice. The timeframe is the same, 10  
21 calendar days. There needs to be a general description of  
22 the business to be discussed at the subcommittee meeting  
23 and it must be also posted on the Internet. And all of  
24 the notices must be made available in appropriate formats  
25 upon request by any person with a disability.



1           There are also provisions for special provisions  
2 or special meetings. And special meetings can be called  
3 without the 10-day notice for required -- for regular  
4 meetings if there is a substantial hardship on the review  
5 committee or where immediate action is required to protect  
6 the public interest.

7           An example of areas that could be considered for  
8 a special meeting would be pending litigation, proposed  
9 legislation or issuance of a legal opinion. Notice for  
10 special meetings must be provided as soon as practicable,  
11 and it must be made to all committee members and to the  
12 media at least 48 hours in advance of that special  
13 meeting, and it also must be posted on the Internet at  
14 least 48 hours in advance of that meeting.

15           And at the beginning of that special meeting, the  
16 review committee must make a finding in open session that  
17 the meeting -- that the 10-day notice requirement would  
18 pose a substantial hardship on the Committee and immediate  
19 interest or immediate action is required to protect the  
20 public interest.

21           There are also provisions in the Bagley-Keene Act  
22 for emergency meetings. And the criteria for an emergency  
23 meeting is where there -- there may be an activity which  
24 severely impairs public health or safety or both or that  
25 there is a crippling disaster that severely impairs public

1 health or safety.

2           There are many requirements in the Bagley-Keene  
3 Act which talk about procedures for closed sessions.  
4 Closed sessions are for very specific purposes. And  
5 examples of these would be personnel matters, pending  
6 litigation, or for real property contracts. I won't go  
7 into these in detail, because I don't anticipate that we  
8 would be needing to hold very many closed sessions. And  
9 if so, you know, we'll discuss that when the question  
10 comes up.

11           The open meeting laws allow for teleconferencing.  
12 That's an option that reduces travel time for the members  
13 and the public. The downside of that is that any  
14 teleconferencing, and we're talking about teleconferencing  
15 where there is a committee member, that location needs to  
16 be set up so that the Open Meeting Act requirements are  
17 met. So members are not allowed to teleconference from  
18 their office or their home or car phone or anything like  
19 that, unless their house or their office is open to the  
20 public, and there's speaker systems so forth set up to  
21 allow for public comment.

22           Some of the restrictions on the deliberations of  
23 the Committee, which might trigger the meeting  
24 requirement, which, you know, might -- would be, for  
25 example, a conference call where the conference call

1 includes a quorum of the membership, which is a majority,  
2 51 percent.

3 Another thing which is not allowed are a series  
4 of 1-on-1 telephone calls before -- between the members,  
5 where, let's say, a staff member might be contacting  
6 various members of the Committee one-on-one, but putting  
7 that information together with the meeting with the  
8 Committee members would constitute a quorum, and that  
9 would be considered a meeting under the Bagley-Keene Act.

10 Another thing which is not allowed, is serial  
11 meetings, where committee members may call, talk to each  
12 other -- let's say A phones B, B phones C, C phones D --  
13 that would be aggregated, if that constitutes a quorum, to  
14 be considered a meeting, and that would trigger the Open  
15 Meeting Act as well.

16 So basically what the purpose is to prevent  
17 deliberations from occurring outside of the public  
18 meeting. So if you can't -- if the discussions are you  
19 can't do it outside of a public meeting, you can't do it  
20 through these processes as well.

21 Secret ballots are prohibited and no votes may be  
22 cast by mail.

23 As to the public, no person can be required to  
24 register or sign-in or to meet any other condition for  
25 attending these meetings. But the members of the public

1 can be required to -- can be asked to identify themselves  
2 for the record when they are making comments for  
3 addressing the Committee.

4 Items on the agenda may be taken out of order.

5 The Committee member -- the Committees are  
6 required to provide an opportunity for the public to  
7 address the Committee on each agenda item before or during  
8 the discussion of that agenda item. And public criticism  
9 of policies, programs, services or acts of omissions of  
10 DHS or the agency are allowed.

11 When writings which are public records are  
12 distributed to all or a majority of the Committee, those  
13 writings must be made available to the public. However,  
14 the records which are exempt from disclosure under the  
15 public records act need not be disclosed. And there are  
16 numerous exemptions under the Public Records Act for  
17 personnel matters, privacy matters, trade secrets, that  
18 kind of thing.

19 If the documents are prepared by DHS or by a  
20 committee member, those documents must be made available  
21 to the public during the Committee meetings. If they are  
22 prepared by some other person and distributed to the  
23 Committee, they must be made available after the meeting.

24 The remedies for violation of the Open Meeting  
25 Act include court actions to stop or prevent violations of

1 the Open Meeting Act, an interested person or district  
2 attorney or the Attorney General can bring these actions.  
3 An action could also be brought to -- for the court to  
4 order that a committee action is null and void and require  
5 the Committee to start over. And these actions are  
6 required to be brought within 90 days of the Committee's  
7 decision.

8 And there's also a misdemeanor remedy which  
9 covers every -- which reads, "Every member of a state body  
10 who attends a meeting in violation of the Open Meeting  
11 Act, where the member intends to deprive the public of  
12 knowledge to which the member knows or has reason to know  
13 the public is entitled is a misdemeanor."

14 And I'd like to ask if there are any questions  
15 from the Committee or the public. Committee, do you have  
16 any questions?

17 CHAIRPERSON KIMSEY: I had a couple. Are we  
18 allowed alternates? At subsequent meetings can we send  
19 someone in our place?

20 SENIOR STAFF COUNSEL ENG: No, there is no proxy.

21 CHAIRPERSON KIMSEY: And the voting is basically  
22 one member one vote?

23 SENIOR STAFF COUNSEL ENG: Yes.

24 CHAIRPERSON KIMSEY: And so a tie vote would mean  
25 something does not -- is not approved is that correct, by

1 the Committee?

2 SENIOR STAFF COUNSEL ENG: The decision-making  
3 process would be by a majority vote.

4 FACILITATOR ABINADER: What if there is a tie?

5 SENIOR STAFF COUNSEL ENG: There is no action  
6 taken.

7 FACILITATOR ABINADER: No action taken.

8 CHAIRPERSON KIMSEY: Other questions?

9 COMMITTEE MEMBER TANNEY: I have one. I'm sorry.  
10 I missed what you said about the notice of the agenda  
11 items, and you made some indication that if there's  
12 something not on the agenda that you want discussed, how  
13 is that accomplished or can it be accomplished?

14 SENIOR STAFF COUNSEL ENG: The best way to deal  
15 with that would be to put the topic on the agenda for the  
16 next meeting to get enough information to make a decision,  
17 for the Committee to make a decision whether to put that  
18 item on the agenda for the next meeting.

19 COMMITTEE MEMBER TANNEY: Okay. And when you  
20 have on the agenda, for instance, proposed regulation  
21 revision concepts, for example, and then you have  
22 facilitated group discussion. That seems like a very  
23 broad category, so how specific does the notice have to  
24 be?

25 SENIOR STAFF COUNSEL ENG: The --

1 COMMITTEE MEMBER TANNEY: Enough to put a general  
2 topic like that?

3 SENIOR STAFF COUNSEL ENG: Well, the -- that  
4 topic I think is more of a process. I think the subject  
5 matter is the revisions of all of the regulations. And  
6 the subject of the discussion is all of the regulations.  
7 And the description of the agenda item is not expected to  
8 be long. It should be under 20 words or about 20 words.

9 CHAIRPERSON KIMSEY: Other questions?

10 THE REPORTER: Could she identify?

11 CHAIRPERSON KIMSEY: Yes, could you identify  
12 yourself, please?

13 MS. WEINGARTEN: I'm Halle Weingarten. I'm still  
14 not clear about the answer to the last question that was  
15 asked, because many of the revisions will be very specific  
16 items. And what you said implies to me that there need  
17 not be on the agenda a list of those specific items; is  
18 that correct?

19 SENIOR STAFF COUNSEL ENG: The specific items are  
20 all the regulations. The Committee is going to be  
21 considering all the regulations. And there's no -- it's  
22 not like only one regulation is an area -- subject matter  
23 area is going to be discussed. All of the regulations are  
24 going to be discussed.

25 FACILITATOR ABINADER: So, for example, if we go

1 through the process today and the Committee decides next  
2 time they want to talk about licensing, site inspections  
3 and training, for example, we would then be able to  
4 specify that on the agenda. Is that the kind of a thing  
5 that you're looking for?

6 MS. WEINGARTEN: Yes, to say that we're going  
7 to -- the agenda item is regulations is very, very broad.  
8 And because what will be considered is specific parts of  
9 the regulations. And so the example that Selma gave us  
10 was basically what I had in mind. Would the agenda  
11 include which specific items would be considered?

12 SENIOR STAFF COUNSEL ENG: Right. The agenda for  
13 the next meeting could be structured that way, that there  
14 would be a specific item, for example, for proficiency  
15 testing. I can understand that that would allow members  
16 of the public who are more concerned about that area to  
17 attend. And members that are -- and the public that are  
18 not interested in that, you know, attend other agenda  
19 items another time.

20 FACILITATOR ABINADER: Today is really more to  
21 kind of lay the groundwork for the process and move  
22 forward and identify the focus of the work. I think  
23 that's why you see it more broad.

24 CHAIRPERSON KIMSEY: Yes.

25 MR. ZEHNDER: Jeff Zehnder, Drug Detection Lab of



1 Sacramento. This may be obvious, but I'm going to ask  
2 anyway, does the public have a vote?

3 SENIOR STAFF COUNSEL ENG: No, the public does  
4 not have a vote. The only people who vote are the 8  
5 members of the Committee. And only those committee  
6 members that are present. And also there needs to be a  
7 quorum, which is 51 percent present at the meeting in  
8 order to make decisions.

9 DR. LEMOS: I'm Nikolas Lemos from San Francisco,  
10 Medical Examiner. I would like to know who votes, if any,  
11 in the case of a member of the Committee being absent, as  
12 in today?

13 SENIOR STAFF COUNSEL ENG: That committee member  
14 does not vote, if he or she is not present.

15 DR. LEMOS: And so he or she would not be able to  
16 submit a vote on this specific matter in any other way, by  
17 proxy or anything else?

18 SENIOR STAFF COUNSEL ENG: No, there's no proxy  
19 voting.

20 CHAIRPERSON KIMSEY: My understand if we were on  
21 a telecon, that voting is allowed by roll call?

22 CHAIRPERSON KIMSEY: Any other questions?

23 Thank you very much.

24 SENIOR STAFF COUNSEL ENG: Thank you.

25 CHAIRPERSON KIMSEY: Next on the agenda we have a

1 presentation from Cathy Ruebusch, who's the Regulations  
2 Coordinator at the Office of Regulations, Department of  
3 Health Services. Cathy is going to talk to us about the  
4 regulation development process and standards.

5 REGULATIONS COORDINATOR RUEBUSCH: Good morning.  
6 I'm not hearing feedback. I'm assuming you can hear me?

7 CHAIRPERSON KIMSEY: Can everyone hear okay?

8 REGULATIONS COORDINATOR RUEBUSCH: I just want to  
9 point out to you in your packets is a PowerPoint  
10 presentation. I am not projecting, but I am putting it  
11 together so that you can follow what I am speaking of  
12 today.

13 I'm Cathy Ruebusch. I'm from the Office of  
14 Regulations for the Department of Health Services. The  
15 Office of Regulations is sort of unique phenomenon in the  
16 Department of Health Services, because our purpose is --  
17 because the Department is so huge -- is to help facilitate  
18 getting regulations put through for the many, many  
19 programs that the Department has.

20 As a result, we are not subject matter experts.  
21 What we are -- except in of what the programs are about.  
22 What we are is subject matter experts regarding what's  
23 called the Administrative Procedures Act.

24 And that is the process in the State of  
25 California that the Legislature has determined is the

1 means by which regulations may be promulgated in the state  
2 of California.

3           The Administrative Procedures Act was established  
4 in 1979 and has been amended many times since then and has  
5 also been amended by court action many times since then.  
6 I want to point out that the regulations for the forensic  
7 alcohol laboratories were written in 1970. They were  
8 amended in 1972, and also in 1975, and then at one other  
9 time in 1986.

10           My point being is the vast majority of these  
11 regulations were written prior to the Administrative  
12 Procedures Act as we know it in the state of California  
13 today. So my point with this being overall is a concept  
14 issue, that when we address these revisions that the  
15 Committee wishes to address, in terms of these  
16 regulations, we will need to meet totally different  
17 standards than how the regulations are written today.

18           The Administrative Procedures Act, the statute  
19 that essentially put us here today said we are subject to  
20 the Administrative Procedures Act. It gave no exemption  
21 to requiring these regulations to be adopted by that  
22 process.

23           I will tell you bottom line in the state of  
24 California we have the most difficult process for  
25 promulgating regulations in the entire country. It is a

1 very, very cumbersome process. The process was  
2 deliberately made that way so that we do not create  
3 frivolous regulations that impact on the public.

4           The Government Code is where you will find the  
5 Administrative Procedures Act. It commences at 11340 and  
6 continues quite a ways in there. It's listed as  
7 Government Code Title 2, Division 3, Part 1, Chapter 3.5.  
8 The regulations that help define this Act are in Title 1  
9 of the California Code of Regulations.

10           What the Administrative Procedures Act did, in  
11 essence, is create what is called the Office of  
12 Administrative Law. They have the final say in terms of  
13 approval of the regulations that we will be promulgating  
14 for the purposes of regulating forensic alcohol  
15 laboratories.

16           The APA creates a definition for regulations.  
17 And that definition says that every rule, regulation,  
18 order or standard of general application if adopted by a  
19 state agency to interpret, implement or make specific a  
20 law that enforces ordinance is a regulation. So anything  
21 we put out that is a general rule of application that a  
22 laboratory must do must be in regulation.

23           The APA creates 6 standards that regulations must  
24 meet. The first one is authority. What that means is we  
25 have to have some statute that tells us we're allowed to

1 do what we're doing. The statute we will be using  
2 generally speaking will be the one that -- that changed  
3 the amended -- the Health and Safety Code last year.  
4 However, there are also several overriding statutes that  
5 allow the Department to promulgate regulations. We'll be  
6 using those also.

7           The second is reference. Reference is, again,  
8 some law, statute, regulation, court decision that we will  
9 be implementing, interpreting or making specific. We  
10 cannot just do something because we feel like it. There  
11 has to be a legal basis for it. The third and probably  
12 most difficult is the clarity standard. And the point of  
13 that standard is regulation must be written in such a way  
14 that it can be interpreted in only one way by the affected  
15 public.

16           The fourth standard is necessity. Again, it's a  
17 difficult standard to meet. And the basis of that is that  
18 a regulation has to be based on evidence. It cannot just  
19 be something we want to do because we like it. There has  
20 to be a basis for it. It can be facts, documents, expert  
21 opinions. There are many things that can be considered  
22 evidence. The bottom line is it has to have a reason to  
23 exist. That it's not just because we felt good about it  
24 today.

25           Consistency is the 5th standard. And that has to

1 do with regulations must be consistent with law, with  
2 other regulations, with court decisions, with statutes.  
3 We cannot just do something that contradicts some other  
4 component of the law.

5           The 6th standard is none duplication. And that  
6 is, again, the whole concept of not putting into  
7 regulations something that is already specified in  
8 regulation or statute elsewhere. That doesn't mean we  
9 cannot do that if -- only under one circumstance that will  
10 be accepted, and that is a circumstance where it is  
11 necessary for clarity. If it makes sense to help the  
12 public understand how they are affected by the  
13 regulations.

14           So essentially our statute tells us that we're  
15 going to be determining revisions of Title 17, Forensic  
16 Alcohol Laboratory Regulations. And that means we have 3  
17 processes by which we can do that. We can either amend  
18 the regulation as it is now, we can adopt new regulations  
19 or we can repeal regulation. You can do those in any  
20 combination you like.

21           The critical piece is anything we do must meet  
22 those 6 standards. And as I brought up as my original  
23 caveat, the current regulations as they are written do not  
24 meet those standards. So if we touch any one of those  
25 sections, in any way, we will have to rewrite it and write

1 it in a manner that meets those standards. It can be  
2 done, but it's just understand that if you truly want to  
3 change something it's going to take some work. I  
4 appreciate you want to get this done quickly, and Lord  
5 Knows, so do I.

6           However, because I'm going to be working very  
7 closely with you through this process. However, I also  
8 want you to understand these standards can be very  
9 difficult to meet at times. It's going to be my job to  
10 help you get there. So don't feel like it's totally  
11 daunting. But there will be times when I'm going to say  
12 yes, I understand, however we can't say it that way. And  
13 let's talk about how we can say it. So this will be a  
14 deliberative process. It will help you get there.

15           But at times it might feel like I'm being very  
16 difficult. But the true outcome is, I want you to get  
17 what you want. And I don't want you to get hung up in  
18 something that I know from experience having put together  
19 many, many, many regulations will end this with A  
20 disallowed.

21           We'll be adopting these regulations by what is  
22 considered the non-emergency regulation process. There is  
23 an emergency regulation process. I'm not going to go into  
24 that here, because we will not qualify for it. There has  
25 to be -- regulations have to be necessary for the

1 immediate preservation of public peace, health and safety  
2 or general welfare. And I think we would have a very  
3 difficult time saying that that is indeed the case with  
4 these regulations.

5           The other component of it is when we adopt the  
6 emergency regulations, they go into effect before the  
7 public process. And I think, as Goldie just pointed out,  
8 public process is considered something very, very critical  
9 to this regulation promulgation process. So we do not  
10 want to bypass the public comment period. I do not think  
11 that would be viewed very well by the Office of  
12 Administrative Law, who will have to rule on whether or  
13 not a regulations truly are emergencies.

14           Not emergency regulations basically then must go  
15 through all the regulation promulgation processes and that  
16 includes all the public comment component. They go into  
17 effect after that. We file a filing order with the Office  
18 of Administrative Law when we are finished. The Office of  
19 Administrative Law then may -- will do their ruling on it.  
20 And at the end, then they will go to be filed with the  
21 Secretary of State.

22           We have one year from public notice to completion  
23 of the rule-making process. If we do not complete the  
24 rule-making process in that timeframe, we must start all  
25 over again. So I'll explain it. Let me get one more.



1           After that period there's a one-month period,  
2 where the Office of Administrative Law will then do their  
3 review.

4           Let me give you more information here. And if  
5 you've got questions, we'll have questions coming up.

6           Regulations package components. There must be a,  
7 what's called, a transmittal memo. This is the official  
8 we-are-creating-regulations-statement. It is usually  
9 something made by the Department. In this case, it will  
10 be made by the Committee.

11           We must have what's called the Informative Digest  
12 Policy Statement Overview. This is essentially what the  
13 public notice is all about. There must be a statement of  
14 reasons. This is blow-by-blow. Every regulation must be  
15 an evidence-based Statement of Necessity for the purpose  
16 of that regulation. This is where we include things that  
17 are called documents relied upon. This is our evidence on  
18 which we are basing this.

19           There is a Statement of Determination. The APA  
20 requires that we make a statement regarding business and  
21 public impact of the regulations we are writing. They  
22 must include the regulation text, the actual language.  
23 And what we will be doing, because we will be revising, is  
24 we will be submitting the actual language as it is written  
25 now with strike-out of those things that we are repealing,

1 underline of those things that we are adopting in the  
2 actual regulation text, so that it is possible to see what  
3 is the current regulation and what are we proposing.

4           If we include any forms or any standards from an  
5 outside group, these will be considered, what are called,  
6 incorporations by reference. They become regulation. If  
7 we do that, this is part of the regulation text. And if  
8 we choose to do that, I will take you through the process  
9 to put that together.

10           There is also what's required is a Fiscal Impact  
11 Statement. This is the fiscal statement regarding how is  
12 government affected by this. What's the impact on local  
13 government, state government, and federal government.

14           After we do all this, there are numerous reviews.  
15 They're a standard part of the process. The first is my  
16 review. Now, we're going to be bypassing a lot of that  
17 because I'm going to be working directly with you, so I  
18 will be trying to prevent you from having problems. So my  
19 review will be very limited. The Office of Legal Services  
20 will have a review. They do need to look at it as a total  
21 package. That will be Goldie's responsibility. She will  
22 be assisting us through this process. However, the total  
23 package you need to do a complete review to be sure that  
24 we do not have any issues that could cause legal  
25 ramifications down the line.

1           The Budget Office must look at it and generate  
2 what is called the STD 399. That is a form that speaks to  
3 the economic impact and the fiscal impact of the  
4 regulations. After all these reviews, these are internal  
5 reviews, Department of Health Services reviews, are done  
6 it is then sent to Health and Human Services Agency.

7           So Health and Human Services Agency is required  
8 to sign the STD 399. So is the Department of Finance.  
9 Usually, they do this -- the APA requires the Department  
10 of Finance to have put together a process that speaks to a  
11 concurrence with the fiscal impact statement from the  
12 Department. What this essentially gives them is a veto  
13 power. If they do not sign the STD 399, the regulations  
14 have to be changed to meet whatever their concerns are.

15           The Department of Finance -- I just don't how  
16 we're going to ever get around not going through them to  
17 be perfectly honest with you. Occasionally regulations  
18 will not go through the Department of Finance.

19           The main reason is, regardless of what you do, it  
20 is going to change the budget for the Forensic Alcohol  
21 Laboratory Overview section. And if there's a change in  
22 the budget, from exactly what it is today, the Department  
23 of Finance will have to get involved. Now, yes, they do  
24 like it when you say we're going to spend less money.  
25 They tend to say oh good sign on the dotted line.

1           If we're going to spend more money, we're going  
2 to have to definitely show some evidence of why we need to  
3 do that. So this is just to give you a flavor for what  
4 we're dealing with.

5           I'm going to tell you something. Health and  
6 Human and Services Agency has to also sign on the STD 399.  
7 And this is separate from what the statute speaks to and  
8 relation to their disapproval. And to be perfectly honest  
9 with you, there is still some question regarding how  
10 that's all going to work, because this is a unique  
11 phenomenon for the Department of Health Services to  
12 actually have an outside review committee assisting the  
13 Department in writing these regulations.

14           You know, frequently we have advisory groups that  
15 help us write our regulations, but you have actual  
16 decision making. And that is a different situation. And  
17 then Health and Human Services Agency has a different  
18 disapproval component than is normally the case. So we'll  
19 be somewhat learning as we go along to a certain extent.

20           The timeline is on this. Now, I appreciated your  
21 statement that you'd love to do this by the end of the  
22 year. And believe me, it's a grand idea. I'll be  
23 surprised if we can pull it off. But if we work really  
24 hard, maybe.

25           Let me tell you why, because from concept

1 determination to completion of a regulation package -- and  
2 this is before we get to public notice, before we go  
3 through all our reviews -- I give that at an indeterminate  
4 time. It very much depends on how complex the package is.  
5 The more complex the package is, the harder it is or the  
6 longer it takes to do this. The more resources that are  
7 dedicated to it, it does help.

8           Obviously, this sections need to get these  
9 regulations out. So we will have resources is my  
10 understanding. I have been dedicated to help deal with  
11 this, so that we can help facilitate this process. But  
12 the bottom line is, the more complex this is, the more  
13 difficult it is. Regulation packages, in the  
14 developmental phase, can take several months to multiple  
15 years depending on how huge the overall is.

16           Then I'm going to tell you in terms of completed  
17 package through all the reviews, and we're going to try to  
18 streamline some of this, usually takes about 9 months.  
19 Now, again, urgency tends to facilitate things. I'm  
20 speaking of global situations in terms of regulation  
21 promulgation and the State of California.

22           Hopefully, there's urgency understood on the part  
23 of the various review people that Health and Human  
24 Services Agency does have a time limit based the statute.  
25 Department of Finance however does not. And the

1 Department of Finance depending on when we get this to  
2 them in terms of the State budget cycle, may or may not be  
3 interested in taking the time rapidly to get this done.

4           So again, we need to time ourselves and try to  
5 get these things to them as rapidly as possible. So I  
6 agree with your urgency, and we'll do the best we can to  
7 do this as quickly as possible. But understand that as it  
8 goes through this, we cannot control the time that the  
9 different agencies take.

10           Then there's always the concern that if other  
11 State Departments must concur, and the only one that I can  
12 see that possibly might need to concur is California  
13 Highway Patrol. I'm glad that there is a committee member  
14 from the California Highway Patrol on here. And hopefully  
15 certainly they will be here in the future to help us with  
16 this.

17           The bottom line is they're the only ones I'm  
18 seeing, at this point in time. But depending on what  
19 comes out of the regulations, we may have to have other  
20 departments tell us whether or not what we're asking their  
21 component to do will work and whether or not it's going to  
22 have a fiscal impact on them. But we must address all  
23 these things.

24           When we go to public notice -- after we've done  
25 all the reviews, we then go to public notice. It takes

1 about a month usually to get the public notice published.  
2 The Office of Administrative Law has to review our public  
3 notice and agree to publish it. It becomes the official  
4 announcement of rule-making to the public. It begins the  
5 45-day public comment period. And it begins the official  
6 rule-making clock. We have one year from the date of that  
7 publication to get it done.

8           We will hopefully get it done much sooner than  
9 that. However, many regulation packages take a good year,  
10 and some of them don't make it. But again, we'll try to  
11 do everything we can to not have problems occur. It's  
12 published in the California Registry Notice Registrar.  
13 It's also known the Z Registrar.

14           When we go to the 45-day public comment period,  
15 we mail the public comments and we mail essentially the  
16 regulation package to all the public who have expressed  
17 any interest in it. Probably the people who are sitting  
18 here in this room will be involved in that, because you're  
19 obviously expressing an interest at this stage of the  
20 game. That's part of why we want to know who you are.  
21 You do not have to tell us. However, if you do you become  
22 somebody who we contact and be sure hears about these  
23 things.

24           The public has a right to written comment in that  
25 45-day period. And the public has a right to a public

1 hearing. We do not have to hold a public hearing.  
2 However, if any member of the public requests a public  
3 hearing 15 days prior to the close of public comment, we  
4 must hold a public hearing. Now, a public hearing in that  
5 case is not this kind of thing.

6           What it is, it's testimony from the public. They  
7 get up. They speak to the rule-making process. And their  
8 comments go on record. The Department does not respond to  
9 those comments at that time. How we respond is what's  
10 called post-comment hearing process.

11           At the close of public comment, we must  
12 respond -- the APA requires that the Department and you as  
13 the rule-making component of the Department must respond  
14 to all public comments, written or oral. We have 2  
15 responses we can make.

16           One, we can essentially thank them for the  
17 comment, but say no, we're not changing anything and why.  
18 Or we can thank them for the comment and say that was a  
19 grand idea, we are changing it in regards our public --  
20 our regulations in this way, and why. So we can either  
21 accept them or reject them. But we must do one or the  
22 other. We cannot strictly ignore a comment. We must  
23 speak to all, regardless of whether or not we like it.

24           If we make modifications to the regulations and  
25 they are sufficiently related to the original public



1 notice, and within the scope of the original public  
2 notice, we then must go out for a second public comment  
3 period of 15 days. This is written only. There's no  
4 public hearing required. Again, we will notice the  
5 interested bodies, interested persons. They have a right  
6 to comment in that timeframe and we must respond to those  
7 comments.

8           If we make no changes, we do not have to go out  
9 to the 15-day notice. If we make changes that are beyond  
10 the original scope of the public notice, we must make a  
11 45-day comment period. I will do my best to prevent that  
12 from happening to help facilitate your process of getting  
13 this through.

14           After we have done all that, we put together what  
15 are called the final rule-making documents. We write a  
16 transmittal memo, and that is the official memo that  
17 speaks to we are promulgating these regulations. And we  
18 send that with the packet to the Office of Administrative  
19 Law. We must include updated informative digest, policy  
20 statement overview. We must include updated regulation  
21 text, and a Final Statement of Reasons. And the Final  
22 Statement of Reasons must include all of our responses to  
23 comments.

24           And then we put forward the finding order. And  
25 that is our official statement to the Office of

1 Administrative Law that we are filing these regulations to  
2 be accepted as administrative law in the State of  
3 California.

4 OAL has 30 days, and that is working days, to  
5 review our packet. If they accept it and approve it, it  
6 is then filed with the Secretary of State's Office and  
7 goes into effect 30 days after that filing. If they do  
8 not accept it, and they make a disallow, they will issue a  
9 legal opinion to us. And we have 120 days to respond to  
10 that legal opinion and make the necessary changes.

11 If that happens, we will very likely have to go  
12 out to another 15-day comment period. All this can be.  
13 It's done all the time. However, it does take time. So  
14 as much as I do appreciate your desire to get these things  
15 don't rapidly, I also want you to get this thing done  
16 once, so that we do not end up with a disallow for the  
17 first thing, and secondly that you get in the end what you  
18 want.

19 That's my presentation. I'm open to questions.

20 CHAIRPERSON KIMSEY: Any questions from the  
21 Committee first?

22 From the public?

23 Thank you very much, Cathy.

24 CHAIRPERSON KIMSEY: We're actually quite close  
25 to being on schedule. We now have a break from 11:30 to

1 12:30. Is there any comments or questions before we take  
2 that break?

3 I would encourage everyone to be back at 12:30 so  
4 we can get started right on time. Thank you very much.

5 (Thereupon a lunch break was taken.)

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1                               AFTERNOON SESSION

2                   CHAIRPERSON KIMSEY:  If I could have your  
3  attention.  We'll go ahead and get started again.  It's  
4  12:30.

5                   The afternoon, we have some -- at least to start  
6  off the afternoon, we have some presentations.  Dr. Mary  
7  Soliman and Mr. Clay Larson are going to give us a review  
8  of the current program.

9                   Dr. Soliman is the Chief of the Food and Drug  
10 Laboratory Branch, Department of Health Services.  And Mr.  
11 Larson is the Chief of the Abused Substances Analysis  
12 Section, Department of Health Services.

13                  Mary, you can go ahead and start.

14                  FOOD AND DRUG LABORATORY BRANCH CHIEF SOLIMAN:  
15 Hello.  I guess you can hear me okay.

16                  I want to welcome you again to the Department,  
17 both the Review Committee members and the public.  I also  
18 welcome you to our Richmond campus.  I want to let you  
19 know that I'm here to support and assist the Committee in  
20 any which way I can to expedite the process for Patricia's  
21 sake.

22                  Let me first start out by giving you a little  
23 background on the branch for the Food and Drug Branch and  
24 a brief run-through of the organizational chart.

25                  Twenty months ago or so I became in charge of the

1 Food and Drug Laboratory Branch. Forensic Alcohol  
2 Analysis Regulatory program is one of the programs I  
3 oversee. I report directly to Dr. Barrett our Division  
4 Chief and Clay Larson is the Section Chief of Abused  
5 Substances Analysis Section. And he's in charge of the  
6 Forensic Alcohol Regulatory Program.

7 We mentioned Agency and the Department, so I  
8 thought I'd give you a little sketch of our org chart.  
9 The Governor's Office has several agencies. One of them  
10 is the Health and Human Services Agency, with Kim Belsh  
11 as the Secretary. And then under Secretary Belshé, we  
12 have several departments. One of them is the Department  
13 of Health Services with Sandra Shewry as the Director.  
14 And she is the one who appointed the Committee members.

15 Sandra Shewry has several other subdivisions.  
16 One of them is prevention services. Prevention Services  
17 has several divisions, Division of Food, Drug and  
18 Radiation Safety with Dr. Barrett as the Chief of the  
19 Division is my direct supervisor.

20 Under the Division of Food, Drug and Radiation  
21 Safety, we have 3 branches. One of them is the Food and  
22 Drug Laboratory Branch. And the Food and Drug Laboratory  
23 Branch has 3 sections. One of them is Abused Substances  
24 Analysis Section. That's where the Forensic Alcohol  
25 Regulatory Program is being handled.

1           So I thought that might help.

2           Earlier this year -- can you still hear me if I  
3 move around?

4           FACILITATOR ABINADER:   Yes.

5           FOOD AND DRUG LABORATORY BRANCH CHIEF SOLIMAN:  
6 All right, great.

7           Early last year -- early this year I sent out a  
8 letter to the Forensic Alcohol Analysis Laboratories with  
9 information on the current status of the Department  
10 Forensic Alcohol Regulatory Program. Of course, with the  
11 new statutes that went into effect January 1st of this  
12 year, licensing is no longer required for the labs. And I  
13 don't want to repeat what Goldie, Dr. Barrett and Cathy  
14 have said already, but basically the labs are not required  
15 to be licensed.

16          However, the Department still retains its general  
17 authority to enforce the laws and regulations pertaining  
18 to forensic alcohol -- forensic breath alcohol analysis.  
19 So the Department has to enforce somehow the law and we'll  
20 have to discuss how we can come about doing that.

21          And, of course, then the statute also required  
22 the Department to appoint an 8-member committee. And I  
23 thank you for your participation. Then the Committee will  
24 review regulations -- the regulations in, I guess group 8  
25 -- I'm the new kid on the block, so I'm not that familiar

1 with forensic alcohol, because I'm new to the branch. But  
2 the regulations are covered in Group 8, commencing with  
3 Section 1215 of Subchapter 1 of Chapter 1 of Division --  
4 of Chapter 2 of Division 1 of Title 17 -- I got that one  
5 right -- of the California Code of Regulations.

6           Then the revisions would be submitted to Agency.  
7 Agency has 90 days to -- and they may disapprove of one or  
8 more of those revisions. I'm a laboratorian and I would  
9 like just to mention that revisions are welcome, but I  
10 don't want us to lose sight that revisions should still  
11 keep competence of laboratories in mind. Quality of the  
12 data should ensure the competence of the labs and its  
13 employees with training and so forth.

14           So then once the Agency approves or disapproves  
15 of some of the revisions, the Department shall adopt  
16 regulations and incorporate the revisions approved by the  
17 Agency.

18           In my opinion, the review committee is playing a  
19 vital and very critical role and that translates into  
20 keeping some of the existing regulations, but revising  
21 others without losing sight of competency of the  
22 laboratories.

23           Also, because the Department still retains its  
24 authority to meet the mandate of enforcing the laws and  
25 regulations, I'm looking for feedback from the Committee

1 as to the means for the Department to meet these  
2 challenges. So if you have good ideas, by all means.

3 I don't want to spend too much time, but I see us  
4 as a team with a shared common goal, which is to protect  
5 the public from individuals driving under the influence of  
6 alcohol. And we can ensure that by having laboratories  
7 that are competent, that can report test results that are  
8 accurate, reliable, and those results can withstand court  
9 scrutiny. So this is an important essential part of  
10 laboratory function. And good results would help convict  
11 the guilty ones and free the innocent.

12 I just want to make a comment as a laboratorian  
13 that forensic -- most other tests in forensic laboratories  
14 are basically qualitative in nature with a present/absent  
15 result sufficient to convict or clear an individual. In  
16 the case of forensic alcohol, an individual driving with a  
17 0.07 percent blood alcohol content is not considered  
18 drunk. That individual has not violated any law.

19 Whereas, someone with -- it is unlawful to drive with a  
20 0.08 percent blood alcohol, and you have violated the law.

21 So we're looking at a difference of .01 percent.  
22 Since you have narrow tolerances, it is important that the  
23 laboratories are competent, that the results are sound,  
24 good quality work, so they won't be questionable in court.

25 So that's basically the major difference, I see,



1 between forensic testing, in general, and forensic alcohol  
2 test, where you have a very narrow margin that  
3 differentiate between a non-guilty and a guilty person.

4           And I just want to make a comment about the  
5 statistics that Dr. Barrett provided this morning. In  
6 California, we have 1,500 deaths due to drunk driving  
7 every year. We have 30,000 injuries in alcohol related  
8 drunk driving crashes on the freeway, and 200,000  
9 arrests -- drunk driving arrests. So the numbers are  
10 huge.

11           And with September around the corner, I couldn't  
12 help kind of compare in my mind. September 11th we lost  
13 over 3,000 people. And the government waged a war against  
14 terrorism, because we lost 3,000 or more lives, innocent  
15 lives, and rightly so. We want to combat terrorism. But  
16 look at in 2 years California is losing over 3,000 people.  
17 And with sound quality test results from the forensic  
18 laboratories, we can ensure that the guilty ones are  
19 convicted and not out to do more harm, and the innocent  
20 ones are not unjustly punished.

21           Quality of results, training of employees, and  
22 ensuring that the labs are very competent overall that is  
23 the main focus. I want to just really urge you to make  
24 the revisions that are necessary while maintaining quality  
25 data from the laboratories.

1 I want to thank you for accepting the nomination  
2 and for participating on -- you know, in this Committee.  
3 And it's going to be hard work, and I'm sure good results  
4 are going to come out of the Committee meetings and so  
5 forth. And I want to thank you again and thank the  
6 public.

7 Let me introduce Mr. Clay Larson. Clay is the  
8 Section Chief of the Abused Substances Analysis Section.  
9 And he is going to cover the Forensic Alcohol Program  
10 activities and responsibilities under the current law.

11 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:  
12 Again, my name is Clay Larson. I'm at the bottom of that  
13 list, but I'm also not the new kid on the block. I've  
14 been in this program for more than 20 years.

15 I want to talk about a document that's in your  
16 packet. It's the document we put together, Proposed  
17 Forensic Alcohol Regulatory Worksheet. It's on legal  
18 paper.

19 FACILITATOR ABINADER: It's on the right side of  
20 the folder.

21 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:  
22 And I'm going to just talk about the first 2 columns. The  
23 left most column lists some activities and the next column  
24 lists the activities under the current regulations.

25 I'm also going to refer, I think, to a document

1 in packet which is a copy of the current regulations. We  
2 hoped to get a newer version. This actually is the  
3 version we've been sending to the labs for years and maybe  
4 that's appropriate. I don't think it's type-written. I  
5 think it was a word-process document, but analysis lost  
6 the electronic form, so we copied it over and over again.

7 Two points. One is in the front of that document  
8 are the authorizing statutes. And actually that's the old  
9 version. That's the version pre-2005. In your packet is  
10 another obviously shorter document. It's the Health and  
11 Safety Code that we are under now.

12 So the other quick note is there are references  
13 in the authority and history sections of the regulation to  
14 refer to Health and Safety Code Sections 436.50. In '95  
15 the Health and Safety Code was recodified it and 436.50  
16 became 100700.

17 So working from this document first, the first  
18 activity is the Development of regulations. Under former  
19 Health and Safety Code section 100700, the Department had  
20 general authority to adopt and publish regulations.  
21 Obviously, that's been changed now. I should add that the  
22 version of the Health and Safety Code that you see in this  
23 2-part document, actually was changed a bit in '92.

24 Prior to '92 we had an advisory committee. There  
25 was a requirement that the regulations were adopted only

1 after the Department consulted with an advisory committee  
2 with people involved and that were affected by the  
3 regulations.

4           And the makeup of the Committee was fairly  
5 similar to the Review Committee. So I think this  
6 Committee might want to keep in mind that existing  
7 regulations were all written after the Department  
8 consulted with them. But then I think the record shows  
9 actually it was a pretty good consensus, after the  
10 Department consulted with members of groups that are  
11 pretty similar to the makeup of the current committee.

12           Item 2 is licensing. Licensing is under former  
13 Health and Safety Code 100720, the Department was  
14 authorized to issue licenses. And under Section 100710  
15 all the labs performing that kind of testing were required  
16 to have licenses. The licenses were renewable annually.

17           The format of the former license actually listed  
18 those activities for which the Department had given  
19 specific approval to the laboratories. So individual  
20 forensic alcohol methods were listed. The bottom of the  
21 section describes breath alcohol analysis procedures. And  
22 laboratories were approved to determine the accuracy and  
23 provide training for operators for specific instruments.  
24 So the old license provided in a shorthand fashion. The  
25 actual activities that the Department had provided

1 approval.

2           They also were a convenient -- since the labs had  
3 to apply for renewal every year, they were a convenient  
4 mechanism by which we knew what labs were doing. The labs  
5 were also required to list is to report any changes of the  
6 activities. So that was the old licensing scheme. --

7           Item 3 is site inspections. Site inspections are  
8 an important component in most every laboratory and  
9 regulatory system to ensure that all laboratory  
10 requirements are being met, and ensure that the  
11 laboratories are using appropriately trained people and  
12 they're documenting the procedures.

13           Under former Health and Safety Code Section  
14 100735, the Department was required to periodically  
15 inspect laboratories. We did conduct those inspections.  
16 However, last fall we suspended all inspections except  
17 inspections for cause, a complaint lodged against a  
18 laboratory or failed PT something like that. During the 3  
19 years prior to last fall, we completed 27 on-site  
20 inspections of the laboratories.

21           Another component of the former and actually  
22 current program is proficiency testing. The Department  
23 conducts proficiency testing 3 times a year by sending  
24 sets of unknown blood alcohol samples to the laboratories.  
25 Results are used by the laboratories, as required by the

1 regulations, to evaluate the accuracy of the laboratory's  
2 methods. We also require individuals to qualify under the  
3 regulations as analysts and supervisors.

4 I'm going to slow down for the stenographer here.  
5 Three cups of coffee and no lunch.

6 Anyway, we also require individuals qualifying  
7 under the regulations to complete a proficiency test, also  
8 as I mentioned. The laboratories generally performed very  
9 well on the tests. But there are occasional  
10 unsatisfactory performances. And I'm referring now to  
11 actually the results outside the acceptable limits.

12 During the last 3 years labs have actually failed  
13 the Department's proficiency tests on 10 occasions. In  
14 each case the laboratories took appropriate corrective  
15 action as directed by the Department.

16 Qualification of appropriate laboratory personnel  
17 is the next item on the list. The Department qualifies  
18 laboratory staff based on evaluation of education,  
19 training and experience. I should say that the actual  
20 requirements for lab personnel are described under Article  
21 2, Section 1216.1(e) through (f). The Department  
22 evaluates the qualifications in a kind of audit based on  
23 their experience and training and education. And we  
24 require labs to -- we require candidates to complete a  
25 proficiency test and written examination.

1           It's a fairly intense activity. A check of our  
2 records shows that for the past 3 years, we handled about  
3 80 to 90 personnel qualification changes per year. This  
4 has slowed down quite a bit this year. In the first 6  
5 months, we processed only 15 personnel qualification  
6 changes. I guess it's a bit surprising since the  
7 regulations still require that forensic alcohol analysis  
8 shall only be performed by people who are qualified by the  
9 Department.

10           The next activity refers to reviews of training  
11 procedures. The general authority or general requirements  
12 are described under Article 4 of the Regulations, section  
13 1218. The laboratories are required to submit summaries  
14 of training programs for breath instrument operators. The  
15 Department reviews these summaries to make sure they  
16 comply with the regulations.

17           In general, training procedures cover theory of  
18 operation, detailed procedure of operation -- again, this  
19 is for breath instrument operators -- use of precautionary  
20 checklists, and require practical experience, and there  
21 must be a written and/or practical examination included in  
22 this.

23           The Department enforces these requirements by  
24 reviewing breath alcohol training procedures submitted by  
25 the laboratories. A check of our records shows that for

1 the last 3 years, the Department's -- the laboratories  
2 have submitted 33 breath alcohol training procedures,  
3 which we've approved. This again is slowing down a great  
4 deal this year. In the first 6 months we've only received  
5 and approved 3 procedures.

6           Again, as we described in our -- we sent an  
7 advisory to the labs on December 31st, which described the  
8 activities that we would be continuing during this period  
9 before we get the new regulations. And one of the  
10 activities we are continuing is the requirement that labs  
11 submit all training protocols, for people who are required  
12 under the regulations, to the Department for review and  
13 approval.

14           And there follows -- not before each one, but  
15 there follows a list of 7 items that are kind of  
16 housekeeping items that have to do with how forensic and  
17 breath alcohol analysis are conducted in the state. So  
18 I'm going to look at them and refer to the actual  
19 regulations themselves.

20           So, for instance, the regulations describe  
21 collection and handling of samples. There are certain  
22 requirements. There are requirements in regards to volume  
23 collected, the personnel authorized to collect, for  
24 instance, blood samples; use of an aqueous disinfectant;  
25 using sterile containers. Those are requirements that are



1 described under Section 1219 of the regulations.

2 Another section of regulations, Section 1220,  
3 requires laboratories to submit written descriptions of  
4 forensic alcohol methods and have them filed with the  
5 Department. The Department reviews these written  
6 descriptions to make sure that the laboratory's written  
7 procedures comply, for instance, with the requirements of  
8 collection of handling samples.

9 During the past 3 years our records shows that we  
10 reviewed and approved 70 forensic alcohol methods  
11 submitted by the laboratories. But as described in our  
12 December 31st advisory, and basically an advisory is  
13 received from our office, we're no longer requiring labs  
14 to submit forensic alcohol methods. So we're actually no  
15 longer doing that activity.

16 I must say, the labs have been a hundred percent  
17 compliant here, because although we continue to receive  
18 some breath alcohol procedures, we haven't received any  
19 forensic alcohol methods in 2005.

20 The next item on this matrix is forensic alcohol  
21 analysis, standards of performance requirements.  
22 Standards of performance refers to requirements for  
23 accuracy and precision of methods, non-interference of any  
24 anticoagulant or preservatives added to the sample, and  
25 obtaining results less than .01 for alcohol free subjects.

1           The regulations set standards in each case. We  
2   require laboratories to submit experimental data to  
3   demonstrate that the method meets those standards of  
4   performance. We do that for a new method. We also  
5   require at least the precision portion when a laboratory  
6   fails a proficiency test, to demonstrate that the  
7   corrective action they took was effective.

8           Now, this is controversial. We also require labs  
9   to submit accuracy and precision data when they move. We  
10   take a lot of criticism for this. I believe it's actually  
11   based on requirements at least in the old regulations, and  
12   I think it's actually good laboratory practice. You know,  
13   when you move to a new facility, there certainly could be  
14   changes in power and water and ambient temperature, and  
15   even storage conditions. Any of these could conceivably  
16   impact the accuracy and proficiency of the lab. I believe  
17   that some redemonstration is appropriate.

18           We've enforced this requirement for years. It  
19   never was much of an issue, but the labs are moving a lot  
20   these days. Our records show that we have 10 lab  
21   relocations in the past 3 years.

22           We moved. Actually, we moved in 2000 -- two  
23   years ago. And we, as we want to do, we applied the same  
24   requirements. So we redemonstrated the acts of precision  
25   of all our methods.

1           I have 5 minutes left. So those are performance  
2 requirements. There also are in the regulations Article  
3 6, Section 1220.2, Forensic Alcohol Analysis Standards and  
4 Procedures, which is how you perform the tests.

5           The regulations set standard procedures for  
6 calibration in the lab, looks at the blank standards and  
7 quality control material, duplicate analysis of samples,  
8 routine accuracy checks. Those are all specified in the  
9 regulations.

10          Again, the Department evaluates compliance of  
11 that through our reviews of the method description, and  
12 also when we do on-site inspections of the laboratories,  
13 making sure that those specific standards and procedure  
14 requirements are being complied with.

15          There's a second regulation, Item 10 here, on the  
16 forensic alcohol analysis and quality control programs,  
17 Article 6, Section 1220.3. The regulation sets fairly  
18 specific requirements for the method quality control, type  
19 of sample you can use, the procedures for determining the  
20 mean value, the procedures for setting the acceptable  
21 limits, and the corrective action you take if you have a  
22 result outside of these.

23          Again, the Department reviews these requirements  
24 by method reviews and on-site inspections.

25          Last couple items. The regulations set forth

1 requirements for expression of results, the number of  
2 figures you express, appropriate truncation of results,  
3 conversion of the breath and urine sample results, and  
4 even the use of specific reporting symbols and  
5 abbreviations. We enforce these requirements also, by  
6 reviewing the methods and by on-site inspections.

7           That takes us -- actually we're half done, in a  
8 sense. That takes care of forensic alcohol analysis.  
9 There is another article, Article 7, that deals with  
10 breath alcohol. A lot of analysis requirements here. But  
11 under breath alcohol analysis there are standards of  
12 performance requirements. Basically, the labs are  
13 required to use instruments that conform with DOT model  
14 specifications.

15           This has been added to the new law, but it's  
16 actually existed in California regulations since 1985.  
17 Procedures for breath alcohol analysis is pretty much  
18 describe in their training programs. And so we review the  
19 training programs -- and again which the labs are still  
20 required to submit. We review the training programs for  
21 compliance with the requirement that they submit the  
22 required equipment here DOT list. DOT being the  
23 Department of Transportation.

24           And as with forensic alcohol analysis there are  
25 breath alcohol analysis standards or procedure

1 requirements. The regulations set standards and  
2 procedures for testing, including the qualification of  
3 instrument operators, duplicate tests and required  
4 agreement of results, periodic determinations of accuracy  
5 and standards for training instrument operators.

6 We review these by site inspection -- for  
7 compliance with these with our site inspections and for  
8 reviews of breath alcohol procedures.

9 Finally, the regulations set forth requirements  
10 for record keeping under Article 8, the last article,  
11 1222.2. It indicates the records that the laboratories  
12 and actually the law enforcement agencies must maintain  
13 employee records, training records, records of analysis of  
14 samples. Last time, we reviewed these compliance  
15 requirements by review of methods and procedures and also  
16 during our site inspections.

17 I made it.

18 All right.

19 CHAIRPERSON KIMSEY: Questions for Mr. Larson?

20 Well, I. --

21 COMMITTEE MEMBER TANNEY: I do have a question.  
22 On the second part of the chart where you have Regulatory  
23 Activities Under New Regulations, various sections say no  
24 requirements, no specific requirements under the law,  
25 you're specifically referring to under the Code of

1 Regulations? You've not -- have you cross-referenced  
2 these with Vehicle Code and other provisions in the law  
3 that may exist with respect to some of these things?

4 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

5 Two points. One, that's the next segment. Although, I  
6 was involved in the preparation of that. It is checked  
7 against the -- not the regulations, but the Health and  
8 Safety Code. And it's only checked against the  
9 requirements of -- and I'm not aware of any vehicle code  
10 requirements, except those related to collection of  
11 samples which may be should have been included there.  
12 That's a good point actually. A comparison was made with  
13 the new versions -- the new Health and Safety Code 100700  
14 to 100775.

15 COMMITTEE MEMBER TANNEY: Okay.

16 CHAIRPERSON KIMSEY: And thank you very much, Mr.  
17 Larson and Dr. Soliman. The next hour we have a  
18 discussion of proposed regulation revisions. And that  
19 really relates to the third column on that handout. And I  
20 believe maybe there's a grammatical correction here. The  
21 top of that column says Regulatory Activities Under New  
22 Regulations, that's "Under New Law".

23 FACILITATOR ABINADER: Right.

24 CHAIRPERSON KIMSEY: That's what I assumed, but I  
25 wanted to -- and so, you know, on the left, you know, we

1 have basically the 14 areas of regulations, at least in  
2 the Health -- in Title 17 that relate to these programs.

3 This column basically is an interpretation of how  
4 that law affects the current regulations. And we can go  
5 through that column if you like. That was what we have  
6 time to do. And then we can do that for a period of time.  
7 Then I believe we're going to take a break. And then we  
8 were going to have a discussion about the proposed  
9 regulation revision concepts.

10 So does that -- I mean, basically what we would  
11 probably do for the next little while is just read through  
12 this third column.

13 FACILITATOR ABINADER: And then I would like to  
14 take people through a focused conversation before we go on  
15 a break and then come back.

16 CHAIRPERSON KIMSEY: Does that meet with the  
17 Committee's interest?

18 Okay. So under development of regulations  
19 basically it's us. We review and determine critical  
20 revisions to the regulations that are necessary to ensure  
21 the competence of the laboratories and employees to  
22 prepare, analyze and report the results of the tests and  
23 comply with the applicable laws." That's a quote from the  
24 law.

25 "DHS is required to adopt regulations and

1 incorporate revisions determined by the Review Committee  
2 unless Health and Human Services Agency disapproves the  
3 revisions."

4           We've heard that several times.

5           On the area of licensing. The new law eliminates  
6 licensing requirements, but retains DHS's mandate to  
7 enforce its regulations. The Review Committee will need  
8 to evaluate mechanisms for enforcement to Californians law  
9 and regulations and a need for State level, technical and  
10 scientific control forensic alcohol analysis."

11           Under site inspections, the new law  
12 "...eliminates the requirement for lab inspections by DHS  
13 or any other organization. The Review Committee will need  
14 to evaluate mechanisms for oversight of forensic and  
15 breath alcohol analysis in the absence of any requirement  
16 for site inspections."

17           Under proficiency testing, the "New law requires  
18 laboratories to follow ASCLD/LAB proficiency testing  
19 guidelines by participating in one annual external  
20 proficiency test obtained from ASCLD/LAB approved test  
21 provide. There is no requirement that laboratories must  
22 successfully complete the test, but each individual  
23 laboratory must have written procedures describing a  
24 review of proficiency test result and the corrective  
25 action taken when results are inconsistent with the



1 expected results."

2 Continuing under the proficiency testing, "Each  
3 'examiner' must successfully complete a proficiency test  
4 each year."

5 FACILITATOR ABINADER: Now, it's working.

6 CHAIRPERSON KIMSEY: Right. I'll start over.

7 "Each 'examiner' must successfully complete a  
8 proficiency test each year. However, according to  
9 ASCLD/LAB guidelines, this requirement can be satisfied  
10 about an 'internal' proficiency test, i.e. samples  
11 prepared by the lab itself or retests of case samples  
12 passed around among the analysts. Moreover, ASCLD/LAB  
13 defines 'successful completion' as either obtaining the  
14 correct response or taking corrective actions in  
15 accordance with laboratory policy.

16 "The Review Committee will need to evaluate  
17 mechanisms for oversight of laboratories' performances on  
18 proficiency test."

19 Qualification of laboratory personnel. "No  
20 specific personnel qualification requirements under the  
21 law. Requirements for qualification of laboratory staff  
22 to be determined by the Review Committee."

23 Reviews of Training Procedures. "No specific  
24 training program requirements under the law. The Review  
25 Committee will evaluate the need for state-level oversight

1 and approval of training procedures in particular, those  
2 for breath instrument operating operator training."

3           Selection and handling of Samples. "No specific  
4 requirements under the law. Regulations for the  
5 collection and handling of samples to be determined by the  
6 Review Committee."

7           Under forensic alcohol analysis standards of  
8 performance. "No specific requirement under the law.  
9 Regulations covering method standards of performance to be  
10 determined by the Review Committee."

11           The same with the forensic alcohol analysis  
12 standards of procedures. "No specific requirement under  
13 the law. Regulations covering method standards of  
14 procedures to be determined by the Review Committee."

15           Same for the forensic alcohol analysis quality  
16 control program. Same for the expression of analytical  
17 results.

18           The breath alcohol analysis standards of  
19 performance. New law requires each lab to ensure that  
20 breath instruments in calibrating devices are listed on  
21 the conforming product lists published by NHTSA, which is  
22 the National --

23           DR. LEMOS: -- Highway Traffic Safety  
24 Administration, NHTSA.

25           CHAIRPERSON KIMSEY: Thank you. "The regulations

1 must be updated to specifically list the current  
2 publications containing the NHTSA lists."

3           Breath analysis standards of procedure. "No  
4 specific requirement under the law(the added NHTSA  
5 instrument requirements do not set standards of  
6 procedure.) Regulations covering standards of procedure to  
7 be determined by the Review Committee.

8           And then record keeping. "No specific  
9 requirements under the law. Regulations covering record  
10 keeping to be determined by the Review Committee."

11           I think this -- I find that this chart is quite  
12 helpful, because it really does sort of layout sort of the  
13 purview of the Committee with all the various regulations,  
14 which I found helpful.

15           Any comments on what was mentioned under the  
16 regulatory activities under the new law?

17           FACILITATOR ABINADER: We are going to go through  
18 a process of discussing this. So if we can keep our  
19 questions brief now, and then go into a more focused  
20 conversation, that would, I think, be helpful.

21           CHAIRPERSON KIMSEY: So have we -- have I zipped  
22 through the -- I mean, the hour, should we go ahead and  
23 start?

24           FACILITATOR ABINADER: We should start with the  
25 focused conversation. But I just want to make sure that

1 as we -- we want to move forward from here and really  
2 discuss kind of the implications of the new law in terms  
3 of what it really says and where you really want to focus  
4 your activities and your energy over the next months that  
5 you're together writing these new regulations.

6 But I just want to make sure that in Column 3,  
7 the Regulatory Activities Under The New Law, if people  
8 have any questions for clarification, you know, before we  
9 get started in our conversation? I just want to make sure  
10 people are comfortable with the interpretation that's here  
11 and if there's any questions that we'll make sure that  
12 we're all on the same page about what's written here and  
13 that it truly reflects what people understand about the  
14 law?

15 CHAIRPERSON KIMSEY: So we would be going through  
16 these at some point then one by one?

17 FACILITATOR ABINADER: Yes. I will be going  
18 through them as part of this, yes.

19 COMMITTEE MEMBER LOUGH: Some of our  
20 organizations, I can't speak for everyone, but I can speak  
21 for CACLD, we've been active in revising the regulations  
22 on how we, as a group, feel. And if some of the others  
23 have done that as well, instead of going through these one  
24 by one, which could take a very long time, maybe if each  
25 organization had this type of information and we could

1 disseminate it to each of the members, we might be able to  
2 nip a lot of these in the bud. If we go through it one by  
3 one, it would take a very long time to go through it. But  
4 some of us -- my organization is pretty much prepared to  
5 bring a tentative proposal forward.

6 COMMITTEE MEMBER TANNEY: And I wasn't clear  
7 whether you were inviting at this time comment about the  
8 interpretation of the law --

9 FACILITATOR ABINADER: No, not during --

10 COMMITTEE MEMBER TANNEY: -- or during the focus?

11 FACILITATOR ABINADER: During the focus.

12 COMMITTEE MEMBER SEDGWICK: If we need a second  
13 on that, I think Patty's proposal is an excellent idea.

14 FACILITATOR ABINADER: So let me talk a little  
15 bit about this focused conversation and tell you about  
16 what the intent of it, and see if it will get us to where  
17 we need to go today.

18 Because what I heard this morning from when we  
19 asked the question what do you hope from this process, it  
20 sounded to me like folks really wanted to make sure that  
21 you respected and were able to come out with a set of  
22 regulations that addressed and ensured the continued  
23 competence of labs and employees to prepare, analyze and  
24 test results and comply with the applicable laws.

25 What I also heard is that you want to make sure

1 that your time together is really focusing on the areas of  
2 the law that really need to be addressed. And that you're  
3 really maximizing the efforts and the energy in this room.

4 And I also understood that we -- that maybe  
5 there's differing opinions around the table about really,  
6 okay, this is what the law says, let's talk about how it  
7 goes into regulation. And that may be different, people  
8 may have different perspectives about that.

9 So this whole idea about a focused conversation,  
10 which I'd like to take you through looks at, through a  
11 series of questions we begin talking about what the  
12 implications of the new law means, really mean. We have a  
13 -- Clay did a good job of laying out these are the DHS  
14 activities under the current regulations. And Paul went  
15 over very quickly what the new law is saying. Okay, so  
16 when we're moving from something old to kind of these new  
17 needing to develop new regulations, it might -- we might  
18 benefit from really having a conversation together where  
19 we're raising what we see are the key issues and  
20 implications of this change from one set of regulations to  
21 another. That way we can begin identifying where the  
22 priorities are for folks to focus their energy.

23 So that's the whole idea, because a lot of this,  
24 as you see, as Paul went through it, a lot of this stuff  
25 isn't really determined. It really isn't -- there isn't

1 much direction given to us in law. So what you have to  
2 really work on, I believe in this Committee, is really the  
3 issues around authority, accountability, assurance and  
4 those kinds of issues. So really getting at where are  
5 those issues really important to address, and what are  
6 some concepts to address in the concepts that you're  
7 talking about Patty that you bring to the -- might bring  
8 to the table next time. That's what this conversation  
9 will help generate.

10           So I would like us to go through -- it will take  
11 about 30 minutes -- a focused discussion where we explore  
12 and reach a common understanding of the issues and  
13 questions that we have around the table about the work  
14 that we have to do, moving toward defining the scope and a  
15 process for accomplishing it.

16           And a process could include, okay, we've  
17 identified these areas as the most important things to  
18 address. Next time around we want concepts -- we invite  
19 concepts from different folks to bring to the table, and  
20 then we'll look at those.

21           So this is really more a conversation to ferret  
22 out a scope of work for this group. Does that sound like  
23 a good way to proceed?

24           CHAIRPERSON KIMSEY: Is that okay to do that  
25 before you make your proposal, I guess --

1           COMMITTEE MEMBER LOUGH: Well, I didn't want to  
2 bring my proposal forward, because I think every  
3 organization may have one, or if they don't, they might  
4 want to just look at what we have as a draft and make  
5 their marks on it or something like that. But that would  
6 have to be disseminated and people would have to do their  
7 homework on it.

8           FACILITATOR ABINADER: So why don't we go through  
9 this conversation and see what it yields for us in terms  
10 of helping us identify where we want to focus the energy  
11 of this Committee and what you see as the important next  
12 steps in the process. And then talk about kind of how do  
13 we go from concept to phase, and what's the mechanism we  
14 want to use to introduce those concepts at the table.

15           Does that sound good?

16           Okay. All right. So I will be asking a series  
17 of questions. I'm going to invite everybody to  
18 participate. So at the beginning I'm going to just kind  
19 of do a round robin so that everybody's opinion and  
20 perspective can be heard. And then we'll just open it up  
21 and generally. But if I don't hear you talking, I may ask  
22 you to -- ask you for your opinion, because I want to make  
23 sure that, you know, we get everybody's perspective out on  
24 the table.

25           So we've just heard a presentation of the new



1 regulations. And this morning we heard a presentation on  
2 the legal responsibilities and a process for revising the  
3 regulations. I don't know if you guys were overwhelmed by  
4 that, but I was like, "Oh, My God".

5           Okay, based on these presentations that you've  
6 just heard, what aspects of the law do you call for the  
7 greatest change in the current program? From your  
8 perspective, when you heard what Paul said, when you  
9 heard, you know, Clay's presentation, what do you feel --  
10 what aspects of the new law do you feel are going to  
11 require the greatest change in the current -- the way  
12 things are currently done? Laura do you want to start?

13           COMMITTEE MEMBER TANNEY: Well, I think the  
14 greatest aspect in the new law, which calls for a change,  
15 is the fact that there is no DHS oversight, so the  
16 procedures clearly have to be changed with respect to what  
17 is going to ensure the competency of the laboratories.

18           But I do have some concerns about some of the  
19 background information that has been provided. And I  
20 don't know if you want to address that now or not. I  
21 think before we even begin to draft some -- or discuss  
22 something, we need to know -- there needs to be some  
23 research done with respect to what laws do exist, because  
24 if I may, I know that with respect to at least the  
25 collection and preservation, handling of samples, there

1 are regulations. There are OSHA regulations, Cal/OSHA  
2 regulations, there are Vehicle Code sections that do apply  
3 to the collection and handling of samples, that have not  
4 been explored or presented at this time.

5 And so the Health and Safety Code is not the only  
6 thing that may end up in conflict with any regulations  
7 that we come up with. And those other background laws  
8 need to be before us before we can begin to examine those.

9 FACILITATOR ABINADER: Okay, so let's identify  
10 that -- Elisa, let's just put a little mark or something  
11 on it. That one and the suggestion of submitting  
12 proposals. So as we talk about the next steps, we make  
13 sure we go back to that and we, you know, clarify what  
14 needs to be incorporated into this information for the  
15 next round.

16 COMMITTEE MEMBER TANNEY: And I'm sorry if I'm  
17 jumping forward --

18 FACILITATOR ABINADER: No, that's fine.

19 COMMITTEE MEMBER TANNEY: -- it's just that I can  
20 even begin to discuss the other stuff.

21 And then I also wanted for clarification the  
22 background information that was given, and I want to  
23 clarify something with respect to the .07/.08 blood  
24 alcohol level. Because one can be driving under the  
25 influence at a .07 blood alcohol level. They cannot be in

1 violation of the B Section, which is blood alcohol level  
2 of greater than .08 percent, which is a per se violation  
3 of the law. But we can have somebody at a .01 or .02  
4 percent who is driving under the influence.

5           And I think that that needs to be understood by  
6 analysts and the laboratories and by our regulations in  
7 general, because reporting, for instance, the -- how the  
8 blood alcohol level is reported, whether it's reported to  
9 the hundredths or thousandths is important when it comes  
10 to those lower blood alcohol levels. And I don't think we  
11 can lose sight of the fact that the lower -- the integrity  
12 of the results with respect to low blood alcohol levels is  
13 just as important as the integrity of the results between  
14 .07, .08 or even greater.

15           So I think that there needs to be a clear  
16 understanding that one can be under the influence of  
17 alcohol and be convicted of it by virtue of not being able  
18 to operate a vehicle in manner of a prudent sober person,  
19 at levels way below .08 percent. It's just that the  
20 presumption does not apply at the very low levels.

21           CHAIRPERSON KIMSEY: The presumption does apply  
22 at the .08?

23           COMMITTEE MEMBER TANNEY: Yes.

24           COMMITTEE MEMBER ZIELENSKI: Well, you can have a  
25 person that's at .07 and be convicted of it as well. I

1 you can retrovert extrapolate that person at a .07 2 hours  
2 later and there's somebody who you could say is actually  
3 at 1.4.

4 FACILITATOR ABINADER: So is there some  
5 information that we'll need to bring to the next meeting  
6 that we need to kind of think about to make sure that  
7 we're all in agreement about the implications of blood  
8 levels, and you know --

9 CHAIRPERSON KIMSEY: I think everyone on the  
10 Committee, except maybe for myself, has that history.

11 FACILITATOR ABINADER: Great. We're pretty --

12 CHAIRPERSON KIMSEY: I don't think we need to  
13 rehash that.

14 COMMITTEE MEMBER TANNEY: Right. And part of my  
15 clarification is for the audience, the public to  
16 understand that, but also that we keep that in mind with  
17 respect to the regulations that are promulgated. But I  
18 think the background information that does need to be  
19 brought over, the Code Sections and the OSHA regulations  
20 and things like that.

21 FACILITATOR ABINADER: And we'll also talk about  
22 this when we talk about next steps and what do we need,  
23 and the information, we'll revisit this toward the end of  
24 the meeting.

25 So I was asking the question from each of your

1 perspectives, what aspect of the new law do you see called  
2 for the greatest change in the current programs. Laura,  
3 did you want to say anything more or do you want move on  
4 to Paul?

5 COMMITTEE MEMBER TANNEY: Go ahead and move on to  
6 Paul.

7 FACILITATOR ABINADER: Okay, great, thanks.

8 CHAIRPERSON KIMSEY: Well, as I'm representing  
9 the Department, I know we've had some discussions  
10 specifically about the impact of the new law on the  
11 Department's role. And I think Column 3, especially on  
12 this first page, really does sort of help direct us to  
13 that, in the sense that, basically eliminated licensing,  
14 eliminated site inspections, and has a major effect on  
15 proficiency testing.

16 I would take a little exception though, because  
17 from our perspective it didn't really remove our oversight  
18 completely. In the sense that, there's this phrase,  
19 "...to ensure the competence of laboratories and employees  
20 to prepare, analyze and report the results of tests and  
21 comply with applicable laws."

22 I think how the Department, you know, progresses  
23 with that is obviously going to be in large part up to  
24 this Committee. But also I think we're going to need some  
25 recommendations on actually how, you know, to go about

1 doing that in the sense that historically or classically  
2 the State agency has something to take away from an  
3 organization if they don't comply with -- you know, for  
4 enforcement purposes, and that's generally been a license.

5           So this law obviously takes away the Department's  
6 ability to issue licenses and do site inspections where we  
7 would also find out if things were not necessarily in  
8 compliance.

9           So we're sort of between -- betwixt here with  
10 still some oversight responsibility and basically unclear  
11 authority maybe or unclear mechanisms for applying that  
12 responsibility.

13           FACILITATOR ABINADER: Thank you. How about you,  
14 Bruce, what do you think of these new laws have the  
15 greatest impact on the current program?

16           COMMITTEE MEMBER LYLE: Well, first of all, I  
17 agree with Laura that I need a little bit more of the  
18 background. The background was good to start me off, but  
19 I'm sort of at a disadvantage as far as most of the  
20 background. One of the things that I think is missing  
21 from my perspective is what the genesis of the change in  
22 the law was. I don't know why it was changed. And it  
23 would help me out to know, you know, what the thinking  
24 behind the changes were, so I could get an idea as to what  
25 my purpose is here.

1           CHAIRPERSON KIMSEY:  So you're interested more in  
2 the history and the background?

3           COMMITTEE MEMBER LYLE:  Well, I'd like to know a  
4 little bit more.  I mean I can go back and research the  
5 history of the Senate Bill, but here it would be nice,  
6 like if I could just get sort of a brief rundown.

7           As far as the areas that I find to be more  
8 specific to me.  And I'm having trouble sort of applying a  
9 lot of this to me, because a lot of it has to do with  
10 breath analysis, and we don't do anything with breath  
11 analysis, since no one is breathing.

12           (Laughter.)

13          COMMITTEE MEMBER LYLE:  But how it affects the  
14 coroner and medical examiner, nobody's -- none of the laws  
15 have said anything about that particular.  It's all having  
16 to do with drunk driving.  And I'm not really 100 percent  
17 sure that it does pertain to those.  Although, our lab  
18 does the analysis.  It was basically the same lab that  
19 does the analysis on samples.

20          But what strikes me as the most important thing  
21 is the proficiency testing and making sure that the lab is  
22 -- that the people in the lab are proficient at doing it  
23 and who would have the authority over saying that.

24          FACILITATOR ABINADER:  Paul, what do you think  
25 has the greatest impact.

1           COMMITTEE MEMBER SEDGWICK: Well, first of all a  
2 little background. For Bruce's information, the blood  
3 alcohol content on a deceased driver does have an effect  
4 on living drivers who may be prosecuted, insurance, past  
5 pedestrians they may or may not have hit. And even though  
6 they can't sue or prosecute the deceased, it does affect  
7 potential prosecution on those living. So that's where he  
8 comes in.

9           How they collect the samples at autopsy, those  
10 are handled in Title 17 as it exists. How the analysis is  
11 done is exactly the same for post-mortem samples as it is  
12 for antemortem samples for the most part.

13           But the bottom line is what I see as changing  
14 here is by re-education of the prosecution and defense  
15 attorneys. If a defense attorney asks a laboratory are  
16 you licensed and they say yes, you don't throw your hands  
17 up and go sit down and say no further questions. You have  
18 to learn the questions to ask about proficiency testing.

19           If an individual has flunked a proficiency test,  
20 what did the laboratory do to fix the problem, what was  
21 the problem? We know with DHS, because they tell us what  
22 they're doing.

23           If DHS is not there, what happens? You have to  
24 ask the right questions. And you need to be able to go  
25 right for the meat and find out what happened and what



1 remediation -- what required remediation was done and is  
2 it appropriate. That's just one example.

3           There are probably dozens of examples for each of  
4 these sections, but that is the sort of thing that I  
5 expect to see changed.

6           FACILITATOR ABINADER: All right, Patty, what  
7 would you say is the greatest?

8           COMMITTEE MEMBER LOUGH: I think the legislative  
9 intent was to greatly reduce the role of the Department of  
10 Health Services' oversight. I think reduce to the point  
11 where they might just monitor proficiency testing, have  
12 that information come in. They can make sure it's been  
13 performed.

14           Paul mentioned by having the oversight you had  
15 something you can take away such as the license. But  
16 actually in DUI cases this is probably subject to the  
17 highest level of scrutiny in almost any trial situation,  
18 even though often times it's just a misdemeanor, but  
19 they're probably some of the most difficult cases to  
20 present.

21           So I think there's going to be plenty of  
22 scrutiny. Certainly defense has every opportunity to say  
23 are you doing these things that the Review Committee said  
24 that you're supposed to do, it was determined to be. In  
25 the court room is where that will all come out.

1           And as was also mentioned, these same  
2 laboratories performing these services are also analyzing  
3 samples not just for DUIs but in homicide cases, crimes  
4 against children, many other cases. So there are huge  
5 implications to other areas as well.

6           So I think the biggest change that we're looking  
7 at is just who controls the oversight, how do we make sure  
8 it gets done, how is everyone competent that the results  
9 are being done. And I think we addressed these easily.

10           FACILITATOR ABINADER: Thank you.

11           Kenton.

12           COMMITTEE MEMBER WONG: I agree with that  
13 totally. With regard to our job here, I see it under the  
14 regulatory activities column under the new law. Although  
15 a lot of these say that there's no specific requirement  
16 under the law, that these things need to all be determined  
17 by the Review Committee.

18           The spirit of Title 17 is still alive and well,  
19 and I believe that it should be. The intent of Title 17  
20 was designed and made as a good thing. And I don't see  
21 changing that in any way, shape or form.

22           There are some minor things in Title 17 that need  
23 to be tweaked and amended due to newer technology. And  
24 overall I don't see our role as totally over rewriting  
25 Title 17, but just tweaking it a little bit.

1 FACILITATOR ABINADER: Okay. Thank you.

2 COMMITTEE MEMBER ZIELENSKI: I'm not a scientist  
3 obviously. But it seems to me that much of what Kenton  
4 was just saying with respect to Title 17 is a great deal  
5 of application to this -- to what we're doing here.  
6 Because my guess is they were probably some on the books  
7 for quite some time, all the forensic labs and labs around  
8 the state have been following those standards. So my  
9 guess is they may very set the standards and precedent  
10 that would be implemented in terms of cross examination.

11 For instance, if their lab doesn't have the  
12 criteria that formally existed under Title 17, we're going  
13 to bring an expert in to say look it here's a way a lab  
14 should do it. This is the way it's been done in the past  
15 and their procedure is defective.

16 So you're going to obviously increase litigation  
17 and create an awful lot more room for argument from our  
18 perspective if many of the standards of Title 17 are not  
19 realized in terms of what we do here.

20 So my guess is you're probably going to have a  
21 large transference of that information and those standards  
22 there into what we have here. The only issue in my mind  
23 is how are we going to make sure that these labs, whoever  
24 they are -- I mean, how do we even know who they are? If  
25 they're not licensed, how are we going to know who's out

1 there doing it? So how do we find out who they are and  
2 then go in and do any type of a check on them to make sure  
3 that they are who they say they are as opposed to some  
4 rogue lab signed up by the defense to go out and analyze  
5 these things.

6           So it's just, to me, the enforcement mechanism  
7 behind how we figure out who they are and what they're  
8 doing and how do we regulate what they're doing and what  
9 standard is going to be extremely important. Otherwise,  
10 you're going to have labs over here and one kind of doing  
11 it this way. Labs with more money are going to be doing  
12 it right. And the ones with less money -- so you're going  
13 to have a situation where there's a direct cause and  
14 effect based upon economics.

15           I'm all for trying to establish fairness and  
16 uniformity in terms of results.

17           FACILITATOR ABINADER: Okay.

18           So in terms of the stuff we heard this morning,  
19 and I know Kenton you want to talk, we'll get to that more  
20 in the open discussion part of this discussion.

21           We heard a lot about the legal responsibilities  
22 this morning. And from your perspective, what are the  
23 things that we really need to keep in mind as we work  
24 together, as you work together about the most important  
25 aspects of the legal responsibilities that -- to make sure

1 we pay attention to?

2 Do you feel like starting?

3 COMMITTEE MEMBER ZIELENSKI: Could you rephrase  
4 that?

5 FACILITATOR ABINADER: Sure. We heard the  
6 presentation this morning on the legal responsibilities.  
7 And I wanted to get a sense from folks what you felt were,  
8 from the legal responsibilities that were defined and  
9 outlined for us, what do you think is key for us to make  
10 sure we are keeping in mind as we move forward?

11 CHAIRPERSON KIMSEY: As it relates to the  
12 Committee?

13 FACILITATOR ABINADER: As it relates to the  
14 Committee and the work that we have to do, both the legal  
15 responsibilities and also the process that Cathy  
16 presented.

17 COMMITTEE MEMBER ZIELENSKI: Well, I think we  
18 probably all have pretty much the same perspective with  
19 respect to what it is that we want to accomplish. And  
20 that is we want accuracy, reliability and legitimacy with  
21 respect to the regulations that are formulated here.

22 To me, that's basically what it is. In terms of  
23 how you we go about that, I assume we all have that  
24 perspective in mind, I think logic and reason obviously  
25 knowledge that you folks have doing this work on a day in

1 and day out basis will allow for a nice gel, I think,  
2 probably at the end with respect to all the issues.

3 FACILITATOR ABINADER: Kenton, do you have  
4 anything about the process or legal responsibilities you  
5 think are important to be mindful of as we move forward?

6 COMMITTEE MEMBER WONG: I too was a little bit  
7 overwhelmed with the legal requirements in changing some  
8 of these things. But I believe that we'll be able to  
9 overcome that. And I think we all have the same -- we all  
10 want the same things out of this.

11 FACILITATOR ABINADER: Patty, do you have  
12 anything?

13 COMMITTEE MEMBER LOUGH: No, just a comment, that  
14 everyone at the table understands that there was a time  
15 that the only thing that was regulated in forensic work  
16 was the alcohol program. As this was mentioned, it  
17 started back in the seventies. And as time has moved on,  
18 things have developed. There are many other watch dogs  
19 out there now to make sure that the work is done good,  
20 many other hoops that you have to jump through. So this  
21 what's started out as a very good foundation initially,  
22 just has sort of run its time out. And there is no other  
23 forensic discipline that is subject to State regulation.  
24 We're just kind of conforming to the rest of the other  
25 forensic disciplines.

1 FACILITATOR ABINADER: Thank you.

2 COMMITTEE MEMBER SEDGWICK: Frankly, I don't see  
3 a lot of change being required in Title 17. Most of the  
4 things they're requiring quality control, proficiency  
5 testing of laboratory, testing of individuals, training.  
6 Most of those are quite good.

7 If we make some substantive changes, like  
8 requiring 2 or 3 or 4 quality control samples instead of  
9 1, so be it. But I don't see a lot of big changes being  
10 made.

11 FACILITATOR ABINADER: Bruce

12 COMMITTEE MEMBER LYLE: Well, the thing that  
13 scared me the most is it sounded like what we have to do  
14 is concentrate ferret out exactly what we need to change  
15 and then concentrate on those things that need to be  
16 changed and not sort of get mired in all the other stuff,  
17 so that we can word it nice and tight and get it passed.

18 FACILITATOR ABINADER: Cathy's the one.

19 How about you, Paul?

20 CHAIRPERSON KIMSEY: Well, I may be more familiar  
21 with our processes than most people here at the table.  
22 But I think it was a good presentation, even though I know  
23 a certain amount of it. I think it's quite clear that if  
24 we're following Bagley-Keene and go through the  
25 Administrative Procedures Act and we have people here to

1 help us, I think it's quite clear what our, you know,  
2 responsibilities are.

3 FACILITATOR ABINADER: Laura, do you have any  
4 comments on the process or legal?

5 COMMITTEE MEMBER TANNEY: Well, I was, in fact,  
6 very happy to hear about the procedures that are in place  
7 for regulations to be passed, because I think that it  
8 needs that type of scrutiny. They need that type of  
9 scrutiny. And I think the important thing for this group  
10 to keep in mind, if making any changes, is that, again, we  
11 do it right the first time, like Cathy said, and we don't  
12 spend a lot of time working on a product that there's no  
13 chance of getting through.

14 And to do that, again, we need to get information  
15 at the outset, the laws, so we make sure we aren't  
16 inconsistent with any laws in existence. And that, again,  
17 like pretty much everybody here feels that we focus in on  
18 what needs to be changed and not messing around with the  
19 things that don't need to be changed.

20 I agree with both Kenton and Paul that Title 17,  
21 the spirit of Title 17 is alive. That we -- that I think  
22 everybody here supports that. As far as it, number one,  
23 having worked for a number of years, and number 2  
24 providing the integrity and reliability thus far.

25 So I think that we need to be very careful in how



1 we proceed.

2 FACILITATOR ABINADER: So what I want to do is I  
3 want to ask one more question that I really want to hear  
4 from each one of you about what you're not clear about or  
5 what you're -- you know, what you're confused or not clear  
6 about, so we can kind of get that articulated or  
7 identified up there. And then I want to go through a  
8 process where we look at each one of these activities and  
9 really start talking about and focusing on where the  
10 decisions are, and which ones you really want to move  
11 forward on.

12 Do you know what I'm saying? Because I'm hearing  
13 from folks around the table that a lot of you feel  
14 comfortable with the way Title 17 is currently written.  
15 So the challenge is okay where do we now focus the  
16 attention and work. So I want to go through that, but  
17 first I'd like to just go around and hear from people --  
18 or we don't even have to go around. Are there elements  
19 about this law that people are still not clear about or  
20 you're confused about that we need to kind of identify and  
21 discuss?

22 COMMITTEE MEMBER ZIELENSKI: I'd like a little  
23 bit more time to actually sit down and to digest -- you  
24 guys have probably already read this stuff many times. I  
25 have not -- the old law and the new law and take a look at

1 the differences and find out, at that point, what needs to  
2 be done. That's something I can do on my own, now or next  
3 time.

4 FACILITATOR ABINADER: So, Torr, do you think  
5 that the information that was provided you -- I know that  
6 Laura had suggested bringing more of the other Health and  
7 Safety codes?

8 COMMITTEE MEMBER TANNEY: Vehicle code, OSHA.

9 FACILITATOR ABINADER: Right, but do you feel  
10 like the information that you have there can give you that  
11 type of background?

12 COMMITTEE MEMBER ZIELENSKI: Well, certainly more  
13 background would not be harmful. You know, I think it  
14 would certainly be helpful. It seems to me, at some  
15 point, you have to give your analysis about, kind of  
16 compare and contrasting the old with the new and find out  
17 how much you can -- what needs to be changed and how  
18 you're to effectuate that change and really the  
19 implementation of what's in the statute.

20 FACILITATOR ABINADER: Does anyone else still  
21 need some clarification? Everybody is pretty clear about  
22 the law?

23 COMMITTEE MEMBER ZIELENSKI: Yeah. I think it  
24 takes some time to digest the totality of what we have to  
25 do here. And the big picture is clear in my mind, but in

1 terms of the nuances and all that type of stuff, I think  
2 that will come after some thought.

3 FACILITATOR ABINADER: So maybe what we can do if  
4 --

5 CHAIRPERSON KIMSEY: I have one more thing.

6 FACILITATOR ABINADER: Yes, Paul, go ahead.

7 CHAIRPERSON KIMSEY: No, it's something that  
8 Patty mentioned, I think, that might be helpful for me  
9 also tying into what lawyer was talking about, is I'm not  
10 sure of what other -- you know, obviously there's OSHA  
11 law, there's Vehicle Code law that relates to the  
12 operation of these laboratories and obviously the people  
13 in the laboratories are much more aware of what sort of  
14 requirements they're under. It might be nice, at least  
15 for my purposes, I don't know about other people that that  
16 aren't in these laboratories, to sort of have an overview  
17 at some point of what sort of regulatory requirements you  
18 are under outside of Health Services.

19 I mean, obviously, there's some comment that, you  
20 know, a lot of this goes through the. And being a  
21 scientist, most of it, at least a few years ago, in the  
22 laboratory, that's not a venue that I am familiar with. I  
23 do know on the clinical laboratory side and the  
24 environmental laboratory side, we do have a lot of  
25 regulatory authority for things like licensing and

1 inspections and that sort of thing, and we do take a lot  
2 of enforcement activities.

3 And so I'm familiar with healthy environment  
4 field, but I am really not familiar with what other sorts  
5 of regulatory requirements or agencies or whatever impact  
6 of the forensic laboratories. So that's some information.

7 FACILITATOR ABINADER: Other folks have anything  
8 to contribute in terms of what you're confused about or  
9 what you're not quite clear about in terms of the law and  
10 its intent?

11 So I would like to go through maybe each one of  
12 these activities and go through a process of talking about  
13 what is the important decisions that may need to be made  
14 in each of the categories and what are the important  
15 issues we need to consider as we make those decisions.

16 This way if we go through it, I know it might  
17 seem like a little bit of an arduous process, but I think  
18 that will really help us begin to ferret out some of the  
19 areas that this Committee may want to really concentrate  
20 its time and effort on.

21 Now, when we began this conversation, I had asked  
22 the question which areas do you think have the greatest  
23 impact on the current programs. And we have up there, I  
24 don't know if we have it here, but people talked about  
25 licensing and site inspections and proficiency, that whole

1 area of accountability, how do you make sure that  
2 laboratories continue to be competent and are able to  
3 prepare and analyze and report the results of the tests  
4 according to the applicable laws.

5 So I'd like to just kind of have a dialogue --  
6 begin having a dialogue about each one of these activity  
7 areas and really try to ferret out what we see are the key  
8 decisions points that need to be made and the issues that  
9 we need to consider as we make those decisions.

10 Does that make sense to folks?

11 Okay. So if we looked at the development of  
12 regulations, does somebody want to just speak to that,  
13 what they see as kind of the key decisions points.

14 COMMITTEE MEMBER SEDGWICK: Question?

15 Development of what regulations, Title 17 as it  
16 originally came in, SB 1623 as it -- or what exactly is  
17 your question?

18 FACILITATOR ABINADER: Okay, my question is when  
19 we look at the new law -- I'm sorry, when we look at the  
20 new law and we know that that law needs to be translated  
21 into regulation, then what are the things that this  
22 Committee will need to decide about and what are the  
23 issues around those decision points that this Committee  
24 would need to consider to be able to make what's  
25 articulated here into regulation? Does that make sense,

1 Paul? Am I being more confusing?

2 COMMITTEE MEMBER SEDGWICK: If I understand you  
3 right, what you're saying is very, very broad.

4 FACILITATOR ABINADER: Okay, help me --

5 COMMITTEE MEMBER SEDGWICK: And what Patty said  
6 earlier, CACLD has apparently talked with a lot of people  
7 or the members. The California Association of  
8 Toxicologists last November set up a working group,  
9 forensic alcohol working group. Those people have been  
10 instrumental. I wasn't even involved in that. I did not  
11 go to that meeting.

12 March 10th we had another meeting, 70 to 80  
13 people. I'm sorry. It was more like about 45 that day.  
14 On March 12th, we had another 30 people, roundtable  
15 discussions. I collected an incredible amount of  
16 information on suggestions for how to rewrite things that  
17 people wanted.

18 Apparently, CACLD has taken not those  
19 suggestions, but those from their members and actually put  
20 them into a form. And you're talking about suggestions  
21 for changing regulations. Somebody has suggestions for  
22 changing regulations.

23 FACILITATOR ABINADER: What I was suggesting is  
24 not talking about the concepts to change, but what are the  
25 decision points.

1           We're sitting at a table with 8 -- 7 people now,  
2   that everybody has different levels of information.  
3   Clearly, both of your groups have done a lot of work, are  
4   very -- you know, you understand very much what the law  
5   might imply, what the regulations might need to look like,  
6   that would reflect the intent of the law.

7           But we also have folks at the table that don't  
8   have that level of understanding. So I don't know what  
9   would be helpful, at this point, Paul, in terms of --  
10   because I know that you're sitting there with already some  
11   things that you want to present, and, Patty, it certainly  
12   sounds like you have stuff that you'd like to present.

13           But what I'm most concerned about today is when  
14   we walk out of this room that everybody has that same  
15   level of understanding about what are the key things that  
16   need to be considered.

17           Yes, Pat.

18           COMMITTEE MEMBER LOUGH: Well, for example, I'm  
19   not sure if this is where you're going, but just as one  
20   part, where we want to ensure the competence of labs and  
21   employees, dah, dah, dah. Well, one way that my  
22   organization has a change that we'd like to implement is  
23   the proficiency testing level.

24           Traditionally, it's always been certain levels.  
25   We would like to see it be broadened, so that you show

1 proficiency in the laboratory at much lower levels,  
2 because you have commercial truck drivers, you have all  
3 kinds of things happening in '02. You have the --

4 CHAIRPERSON KIMSEY: All levels of alcohol.

5 COMMITTEE MEMBER LOUGH: The zero tolerance. You  
6 have all those things. Those are never and have never  
7 been tested. And we would like to see, as a scientific  
8 group, the addition to test at a much broader range, not  
9 just always a narrow range that centered around the DUI  
10 driver or the typical DUI driver.

11 So that's just one way we looked at it as a  
12 scientific group, we'd like to see it change.

13 COMMITTEE MEMBER SEDGWICK: And not just testing  
14 proficiency, setting up methods, analytic methods, that  
15 are perfectly good from a .01, and we know how good they  
16 are, from .01 to a .04, where the Department of  
17 Transportation kicks in up to a .35 or a .50 where our  
18 coroner friend kicks in. And knowing that the methods  
19 we're using are good by whatever validation that's  
20 required or quality control throughout the whole range.

21 FACILITATOR ABINADER: So that would relate to  
22 the proficiency testing?

23 COMMITTEE MEMBER SEDGWICK: She's talking about  
24 proficiency testing. I'm talking about analytic methods.

25 FACILITATOR ABINADER: So in terms of what you



1 were saying Patty. In terms of the proficiency testing,  
2 the concept that you're suggesting or your group is  
3 suggesting, what is the intent of it, what's it based on?  
4 Is it based on making the regulation more --

5 COMMITTEE MEMBER LOUGH: It goes along the lines  
6 of what Laura was saying is you have to incorporate what  
7 the laws say so that your science is able to backup what  
8 the law says. So if DUI says you have a 0 tolerance or  
9 you have an .04 commercial or an airline or whatever that  
10 situation is, you know, you can do it analytically. You  
11 can do that by proficiency testing your people, but also  
12 your quality control standards are still set up,  
13 basically, at the 1.0 DUI level, which has been dropped  
14 down years ago.

15 COMMITTEE MEMBER TANNEY: So for instance when  
16 they come up with an .02 blood alcohol level and the  
17 proficiency testing only tests between .08 and .10, for  
18 example -- I don't know what it is -- then that subjects  
19 the defense to be able to cross examine well your  
20 proficiency only shows that your reliability or accuracy  
21 within this particular blood alcohol level range, but how  
22 do we know that you have that level of accuracy with  
23 respect to the .02 percent rage? Is that where I'm --

24 COMMITTEE MEMBER LOUGH: Right, because the  
25 proficiency tests I don't think have ever been lower than

1 a .09 if that's right, Clay? It's never been lower than a  
2 .09?

3 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:  
4 .10.

5 COMMITTEE MEMBER LOUGH: .10. They usually I  
6 think target .10. So that to us scientifically means, you  
7 know, we should be testing there and we would like to see  
8 the regulations state that.

9 FACILITATOR ABINADER: Okay. So let's start a  
10 list. That's why I was pointing at you Elisa. Let's  
11 start a list of the areas of the law that we need to  
12 really focus on. We've talked about proficiency testing.  
13 You, Paul, brought up the idea of a -- I spaced on it. If  
14 we could start --

15 COMMITTEE MEMBER SEDGWICK: Quality control and  
16 method development.

17 FACILITATOR ABINADER: Okay. So let's just start  
18 listing out what areas of the law that this group feels we  
19 need to develop concepts around that are priorities. Do  
20 you what I mean? And then we can just start discussing  
21 the concepts around those particular areas.

22 COMMITTEE MEMBER TANNEY: Well, I think there's  
23 regulations already, if I'm reading the -- reading them  
24 correctly, that have to be repealed just based on DHS's no  
25 longer having the oversight, because right now are there

1 not sections within Title 17 that talk about DHS  
2 oversight?

3 So those are going to have to be either repealed  
4 or modified somehow to address the very first issue here,  
5 which is, again, that DHS no longer has the same degree of  
6 oversight it had.

7 FACILITATOR ABINADER: Right. And, Paul, I want  
8 to make sure we get yours up there. We have the oversight  
9 power. We have the proficiency testing. You were talking  
10 about --

11 COMMITTEE MEMBER SEDGWICK: You can probably  
12 simplify it as broader quality control.

13 FACILITATOR ABINADER: Okay, great, broader  
14 quality control. Other areas that the group feels that we  
15 need to focus on -- needing to focus on?

16 COMMITTEE MEMBER TANNEY: Well, I have a question  
17 for the toxicologists and lab analysts present. Is the  
18 new technology -- I mean, if these were written in the  
19 seventies, is there new technology and new methods that  
20 make the use of regulations obsolete that need to be  
21 looked at?

22 For example, again in the collection and handle  
23 of samples, they talk about reusable equipment. I know  
24 that it depends on what we're talking about, with respect  
25 to vacutainer tubes. My understanding is OSHA now

1 requires that you use single-use tubes. So are some of  
2 the -- and I'm asking this question. I don't know the  
3 answer. Are some of these regulations obsolete as a  
4 result of new technology or advancements in science?

5 COMMITTEE MEMBER SEDGWICK: They could be if we  
6 choose to make them so. When Title 17 kicked in, most  
7 people, many laboratories, were using the oxygen method.  
8 Most of them use reusable glassware. And they very  
9 specifically did not tell the laboratories what kinds of  
10 methods to use, because for the most part most methods can  
11 do most things exceptionally well.

12 The new technologies allow much greater  
13 precision, much greater accuracy. The difference between  
14 a .07 and .08 is an incredibly large amount when you're  
15 working at 3 good decimal places maybe even 4. I don't  
16 think of that reproducible, but we're working on it. And  
17 most of the laboratories today now use or -- use  
18 disposable glassware. But I don't know whether it's our  
19 position or whether we even chose to take that position to  
20 require that they do it.

21 COMMITTEE MEMBER TANNEY: No, I agree with you.  
22 I mean, I think my point is the regulations have to be  
23 expansive enough broad enough to allow for advances in  
24 technology. I'm not trying to make them restrictive.  
25 That's not what I'm getting at. I'm getting at are there

1 restrictive regulations now that interfere with the  
2 ability to implement new technology, that need to be  
3 changed? That's my point.

4 COMMITTEE MEMBER LOUGH: There are some things  
5 that are, I'll call, archaic in how things are to be  
6 performed. And I think it's generally accepted in the  
7 forensic science community as being archaic. And those  
8 things I'd like to see changed.

9 COMMITTEE MEMBER TANNEY: That's what I'm getting  
10 at.

11 FACILITATOR ABINADER: So we want to make sure  
12 that we get that. So we want to make sure that the  
13 regulations that are restrictive to introducing new  
14 technologies are looked at in light of the work that  
15 you're doing here, correct?

16 COMMITTEE MEMBER TANNEY: Right.

17 FACILITATOR ABINADER: So other areas that you  
18 feel this Committee needs to focus its attention and make  
19 decisions about?

20 COMMITTEE MEMBER LOUGH: Personnel training.

21 FACILITATOR ABINADER: Okay.

22 COMMITTEE MEMBER LOUGH: How someone becomes  
23 qualified. Not that it needs that much of a change, but  
24 it does need a little bit of tweaking.

25 FACILITATOR ABINADER: Great. Other areas. This

1 is where we're starting to develop the list of where we  
2 focus our attention. And that's why I was trying to --  
3 you know, for folks to look at column 1 and column 2 and  
4 really think about what are the implications and where is  
5 it that this law is really indicating that there are some  
6 key decisions that need to be made?

7 COMMITTEE MEMBER LOUGH: Can I ask the lawyers a  
8 question at the table?

9 FACILITATOR ABINADER: Sure.

10 COMMITTEE MEMBER LOUGH: With regard to  
11 proficiency testing, is it important to you to go to a  
12 State agency say did the San Mateo lab pass their  
13 proficiency test or is it suitable for you at trial to  
14 have them state or provide documentation that they have  
15 participated as the law reads in proficiency testing and  
16 perform them? Do you need a body sitting at the State to  
17 tell you that as an intermediate person?

18 COMMITTEE MEMBER ZIELENSKI: Well, I'd like to  
19 have some enforcement mechanism, someone that might be  
20 able to challenge what it is that they say that they've  
21 done. And there are various levels of failure at a lab in  
22 which they might -- it doesn't look to me like there's  
23 even a requirement that the labs successfully complete a  
24 test, as long as they took the remedial efforts to go  
25 ahead and fix the problem. But that's kind of like asking

1 the fox to attend to the hen house.

2 COMMITTEE MEMBER LOUGH: Well, that's the  
3 situation that exists today. If someone doesn't pass  
4 their State proficiency test, then they remediate. That's  
5 the situation.

6 COMMITTEE MEMBER TANNEY: I don't understand your  
7 question.

8 COMMITTEE MEMBER LOUGH: Okay. Currently, the  
9 State sends out the proficiency test. We all take a test,  
10 send our answers, and nobody ever asks us about them in  
11 court.

12 If we didn't have the State saying them --  
13 because for the most part the laboratories that perform  
14 the bulk of this work are public laboratories, and they're  
15 all accredited through a national organization, and  
16 they're subject to proficiency testing by a national  
17 agency. So they are going to be doing it. It's only the  
18 defense labs and perhaps a few independent labs that are  
19 currently -- they don't even have to be licensed now.

20 So if my lab doesn't have the State sending me  
21 samples, but the law says you have to do ASCLD/LAB  
22 proficiency testing stuff, do you need to have someone in  
23 the State -- do I have to send proof to them that we've  
24 done our tests? Do you need to pay for a person to sit  
25 there and say, okay, all of the labs have to send me their

1 paper that they've taken their tests? Or is it sufficient  
2 in trial to ask has your lab participated in the program  
3 as prescribed by law?

4 COMMITTEE MEMBER ZIELENSKI: Well, I mean to  
5 validate their position, I think you want some means of  
6 checking that.

7 FACILITATOR ABINADER: If they've complied?

8 COMMITTEE MEMBER ZIELENSKI: Yes. To what extent  
9 what was their problem, as well. I mean what was the  
10 problem with the lab, and how extensive was it? Was it  
11 minor? Was it medium? Was it really significant?

12 COMMITTEE MEMBER LOUGH: For those that had a  
13 problem?

14 COMMITTEE MEMBER ZIELENSKI: Absolutely.

15 FACILITATOR ABINADER: Okay. So then one of the  
16 areas that need to be on this board over here really has  
17 to do with compliance, how do you ensure compliance.  
18 Particularly when a lab is found noncompliant, how do you  
19 ensure that they've addressed the issues of noncompliance.

20 COMMITTEE MEMBER LOUGH: Yes, do you need  
21 something outside the discovery, I guess, is what I'm  
22 asking? Because obviously you can get all this  
23 information through discovery.

24 So do you need to have something out of  
25 discovery, do you need to pay a State employee to sit



1 there and send you something that you couldn't  
2 automatically get through the discovery process?

3 COMMITTEE MEMBER ZIELENSKI: As a means of  
4 checking what it is that they provide us, yes. I mean,  
5 that would be my concern is that you would have a  
6 representation that there's been compliance, when, in  
7 fact, there is no means of checking what they say they do.  
8 How do you validate what they said they've done.

9 So you're more or less taking their word at that.  
10 If you've got a lab out there running a muck, then you  
11 could have a situation where there's no check on it.

12 COMMITTEE MEMBER TANNEY: If I understand your  
13 question. Generally, we're always required to have the  
14 live witnesses unless the defense stipulates to a certain  
15 blood alcohol result, which happens much of the time. If  
16 there's any question because we don't have any information  
17 to give them ahead of time, documentation regarding  
18 proficiency or accuracy or reliability, then I would  
19 imagine they would be less likely to stipulate because  
20 they would want to cross examine that person on the stand.  
21 And that would require many more courtroom hours for  
22 laboratory personnel coming in.

23 So it would be, I think, both the defense and the  
24 prosecution's interest to have some documentation of  
25 that -- that ensures that accuracy, if we're not going to

1 eliminate stipulations completely.

2 COMMITTEE MEMBER LOUGH: Right. And if you're,  
3 for instance, an ASCLD/LAB accredited lab, which the  
4 majority are, that information -- you have a quality  
5 control manager. They have all this. And then have all  
6 the information they can send you. They could say here's  
7 the levels of proficiencies that went out. This is your  
8 score.

9 And certainly if you have a laboratory that is  
10 not performing, they're going to have to come in and  
11 defend their result, absolutely.

12 So that's just a question, do we need to have a  
13 State person do that or is it sufficient in accredited  
14 labs to have the quality control manager, quality  
15 assurance manager maintain the documentation to provide it  
16 when requested?

17 COMMITTEE MEMBER TANNEY: When you say a State  
18 person, you mean from DHS?

19 COMMITTEE MEMBER LOUGH: Yes.

20 FACILITATOR ABINADER: So under compliance --

21 COMMITTEE MEMBER TANNEY: So we don't have them  
22 come in generally now. We, usually, rely on the  
23 information we get from the individual laboratories.

24 COMMITTEE MEMBER LOUGH: And I would assume that  
25 the State now wouldn't be providing that information

1 because that's provided in discovery information without  
2 going through the prosecuting agency. So I don't know how  
3 that information would even get relayed now in.

4 FACILITATOR ABINADER: So we've got up there  
5 personnel training. Is there something up there that  
6 needs to be up there around the qualification of the  
7 laboratory personnel. Is that an issue that the group  
8 wants to address of how do we know?

9 COMMITTEE MEMBER TANNEY: That would be under  
10 personnel training, I would imagine.

11 FACILITATOR ABINADER: It's a separate activity  
12 in the work currently, but that's okay. I just want to  
13 make sure under, you know, personnel training if we want  
14 to include in that a conversation about qualifications.

15 COMMITTEE MEMBER LOUGH: Yeah. I think it should  
16 be personnel training. It should include what kind of  
17 titles these individuals are going to have.

18 COMMITTEE MEMBER TANNEY: I think what Paul said  
19 earlier is the position I'm finding myself in as part of  
20 the same as Torr, I'm not familiar with what all the  
21 regulations say right now, and whether we need to have a  
22 discussion on each and every one depends on whether we  
23 identify them as something that needs to be changed.

24 I mean, all of these things have to be addressed,  
25 but maybe they're already satisfactorily addressed by

1 Title 17 as it exists now. And I think from my point of  
2 view, it might be premature to have this discussion trying  
3 to limit what we're going to be discussing in the future  
4 without now having the background that we have and perhaps  
5 getting some more, and having the opportunity to go  
6 through it ourselves. I don't know.

7 COMMITTEE MEMBER ZIELENSKI: Actually, what  
8 sounds ideal to me is looking at Title 17 as it was,  
9 looking at the new law now, and looking at what it is that  
10 these folks have apparently done an extensive amount of  
11 time -- or you know, spend an extensive amount of time  
12 evaluating. It seems like they're the experts in terms of  
13 doing this type of stuff.

14 So I'd like to see what they have, see what's in  
15 Title 17 and see what obviously is in the new law and take  
16 from those 2. Maybe with any additional suggestions from  
17 the panel here, you know, extrapolate between all those 3  
18 things as it relates to the new law.

19 CHAIRPERSON KIMSEY: Did anyone else have some  
20 concepts?

21 COMMITTEE MEMBER LYLE: Well, it sounds like one  
22 of the big questions after we're done with all that stuff  
23 that we should decide on, is it more efficient or is it  
24 better that more in the spirit of the new to allow the  
25 final say to be battled out in court or should there be a

1 regulatory body that handles it. Is that what you're  
2 asking?

3 COMMITTEE MEMBER ZIELENSKI: I think if you don't  
4 regulate it, you're going to have some real problems in  
5 court. I mean, potentially with respect to --

6 COMMITTEE MEMBER LYLE: So the courts is not the  
7 place to have it solely --

8 COMMITTEE MEMBER ZIELENSKI: You can have it  
9 there, but you may have problems of admissibility. A lab  
10 does, you know, their work in a certain way. They may not  
11 have established Kelly-Frye standards and be generally  
12 accepted in the scientific community. So I think keeping  
13 that in mind for purposes of admissibility on down the  
14 road, it seems to me Title 17 is a good solid starting  
15 point.

16 With reference to the work that you folks have  
17 done, being experts in that field, compare those 2 things  
18 and see how the interrelate with the new one and --

19 COMMITTEE MEMBER TANNEY: I'm getting the feeling  
20 that we're starting from 0 in this discussion rather than  
21 starting from Title 17 as it exists and then determining  
22 whether any of it needs to be revised.

23 And to me that's a much easier place to start is  
24 with Title 17 as it exists rather than trying to build  
25 from the ground up, whether we need to discuss everyone of

1 these, which I would say, yes, we do, if we don't already  
2 have Title 17 as a starting place.

3 FACILITATOR ABINADER: And do we have Title 17 in  
4 our packets?

5 COMMITTEE MEMBER LOUGH: Yes, it's in there.

6 FACILITATOR ABINADER: There's only one thing I  
7 want to bring up in terms of a little bit of a concern I  
8 have about going immediately to concepts. And that's  
9 ensuring that people really understand what the  
10 implications of the new regulations are, so that when --  
11 or the new law is, so that when you're reviewing the  
12 concepts, when you're looking at the concepts that people  
13 are presenting, you're really have a sound background on  
14 understanding what the implications are, what the current  
15 program was doing and why it was doing that -- you know,  
16 why did they decide to do this or focus on that or not  
17 focus on that -- and what the new law may mean.

18 And then when you entertain the concepts, we're  
19 sitting around the room where everybody is kind of sharing  
20 and understanding of the implications.

21 And that's where I was trying to get to today.  
22 But it sounds like folks, first of all, need some more  
23 background information, more time to kind of digest. And  
24 it also sounds to me like it would -- this group would  
25 benefit from reviewing Title 17 to really think about, you

1 know, what aspects of Title 17 really folks feel

2 comfortable with and then move into concepts.

3 Is that -- am I reading the group right?

4 CHAIRPERSON KIMSEY: I think some of that the

5 workload though -- I mean, I think for the purposes of

6 today -- I think, of course, it's about time for a break.

7 That's kind of the job of the Chairman -- would be to come

8 back after the break and have some discussion about the

9 concepts or the proposal that Patty's group is bringing

10 forward.

11 From my perspective, I think the suggestions of

12 setting things down and reviewing them is going to be

13 unfortunately homework. I mean, especially for those of

14 us that aren't as familiar with this area. And getting

15 other background information out to us. And so I would

16 have a feeling that, you know, at a subsequent meeting of

17 some sort that then we would have a discussion starting

18 with Title 17 and looking at what they're proposing and

19 having us all a bit more at the same level -- playing

20 field with regard to having reviewed the concepts.

21 COMMITTEE MEMBER TANNEY: And maybe when you

22 first went around the table and asked what our goals were,

23 what we were hoping to see, the way I view my role in this

24 is that the laboratories have to -- they're the ones

25 familiar with the procedures. And what my role is, as far

1 as I'm concerned, is to make sure that what is  
2 developed -- certainly to give input, but to make sure  
3 that what is developed is something that will withstand  
4 the scrutiny in court and maintain the integrity of the  
5 process.

6           So rather than, as much being a developer of the  
7 regulations, rather than a reviewer -- and I'm not saying  
8 I'm not willing to participate in developing them, but  
9 again that's difficult to do at least without the  
10 scientific background that the analysts and the people at  
11 ASCLD and the California Association of Toxicologists  
12 have. But I certainly want to be able to provide input as  
13 to whether or not any proposal would be detrimental to the  
14 prosecution of driving under the influence cases or  
15 detrimental to the integrity of the process.

16           I don't know how you feel.

17           COMMITTEE MEMBER ZIELENSKI: I agree totally.  
18 That would be my view of it.

19           CHAIRPERSON KIMSEY: Do we want to take --

20           FACILITATOR ABINADER: Well, let's take a few  
21 minute break and then regroup and see where we want to go  
22 from here.

23           (Thereupon a recess was taken.)

24           FACILITATOR ABINADER: We're going to go ahead  
25 and try and get started again.



1           CHAIRPERSON KIMSEY: We're going to go ahead and  
2 get started again.

3           Thank you all. We've had a little discussion  
4 around -- with regard to the use of the time for the rest  
5 of the day. And Selma and I are going to try and sort of  
6 summarize where we think we are and have some discussion  
7 on that.

8           It would appear that we have one group, at least  
9 that has brought some ideas of some concepts for changes  
10 to the regulations. And we may have a bit of an overview  
11 of that. I think, there's more detail there than we can  
12 get into today. Patty mentioned that she can get that to  
13 us in an electronic format, and so we can, as has been  
14 discussed, sort of do some homework and some comparison of  
15 Title 17 and some proposed ideas. And that would not  
16 preclude any other organization that might have some ideas  
17 to present. I don't think anyone else is prepared today,  
18 but at a subsequent meeting there may be some other  
19 concepts presented.

20           And so we're thinking that if we could spend like  
21 20 or 30 minutes maybe at a higher level going over the  
22 concepts from Patty's group, the Association of Crime Lab  
23 Directors. And then we can have a little bit of maybe a  
24 background -- a little bit of the last number of years and  
25 what led up to the legislation a bit from the

1 laboratories' perspective. And then we're going to have  
2 some public comment.

3           Before we get to public comment, we'll probably  
4 go over the committee structure and leadership  
5 responsibilities, talk a bit about our next meeting, which  
6 I would encourage that we try and maybe do by a telecon or  
7 a video conference type of a format. Now, that we've all  
8 sort of seen each other, I think we'll recognize each  
9 other's voices. We can make arrangements for the public  
10 to be able to call in also.

11           Were there other items?

12           FACILITATOR ABINADER: No. I think that, Patty,  
13 you thought that maybe the stuff that you had to present  
14 would be too extensive to present today?

15           COMMITTEE MEMBER LOUGH: I think to go into it,  
16 yeah. And it would save time if we could compare the  
17 existing Title 17 to the revisions that we would be  
18 proposing.

19           FACILITATOR ABINADER: And I think Paul and  
20 Kenton didn't also your organizations have concepts that  
21 they wanted to put forth?

22           COMMITTEE MEMBER WONG: Yes.

23           FACILITATOR ABINADER: And also anyone else,  
24 you're saying Paul has invited DHS included, to present  
25 concepts as well?

1 CHAIRPERSON KIMSEY: Sure.

2 FACILITATOR ABINADER: Okay.

3 CHAIRPERSON KIMSEY: So did you want to go over  
4 them just a little bit or did you just want to get them to  
5 us electronically?

6 COMMITTEE MEMBER LOUGH: I think electronically.  
7 I think it would be easier for you to have them side by  
8 side and compare them.

9 FACILITATOR ABINADER: I would note for the  
10 public to receive them, please be sure when you signed in,  
11 go back and put in your E-mail address, if you will.

12 DR. LEMOS: Could you post them on the Internet  
13 website as well?

14 CHAIRPERSON KIMSEY: That's a very logical  
15 suggestion. And the only difficulty being sometimes the  
16 timing on that is not -- is Larry still here?

17 How is your folks IT on being able to get things  
18 posted on your website?

19 FOOD, DRUG AND RADIATION SAFETY DIVISION CHIEF  
20 BARRETT: Basically, if I get it that day, I'll post it up  
21 on to the site?

22 CHAIRPERSON KIMSEY: Oh, okay.

23 And can I have him work on my website.

24 CHAIRPERSON KIMSEY: Either way, you can leave  
25 your E-mail address and we'll send it to you and then

1 we'll also post it on. And this is your --

2 FOOD & DRUG LABORATORY BRANCH CHIEF SOLIMAN:

3 dhs.ca.gov/fdlb.

4 FACILITATOR ABINADER: So if you go to the

5 Department webpage, you'll be able to drill down to it.

6 In fact, maybe could you put that up on the --

7 Can you give it to her Mary, again, so we have

8 the website.

9 FOOD AND DRUG LABORATORY BRANCH CHIEF SOLIMAN:

10 www.dhs.ca.gov/fdlb, right Chris?

11 F as in food, D as in drug, L as in lab.

12 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

13 It's also on the agenda at the bottom of the page.

14 CHAIRPERSON KIMSEY: Good timing. It's at the

15 bottom of the agenda.

16 FACILITATOR ABINADER: So maybe I could just

17 summarize what we at least identify as areas that would

18 need to be addressed. And I believe that the proposals

19 that people will see from the different groups will

20 address these.

21 But some of the things we talked about that would

22 need to be focused on are issues around or regulations

23 around proficiency testing, oversight powers, broader

24 quality control, personnel training and qualifications,

25 compliance for labs, and enforcement regulation who will

1 oversee.

2           And there were a few others that I'm losing here.

3           Oh, and then ensuring that there aren't

4 regulations that are restricting the ability to use more  
5 innovative equipment.

6           Anything else I missed?

7           So what I'm hearing from folks is that Title 17  
8 that there doesn't seem to be the need to do a whole lot  
9 of changes in Title 17. That folks are suggesting that  
10 the concept papers that get sent to you that you look at  
11 them in relationship to Title 17, and that the next  
12 discussion at the next meeting would talk about the  
13 concepts and talk about Title 17 and where people found  
14 issues or where there might be some areas of confusion or  
15 areas that needed further discussion.

16           So, if I may Paul, I would like the group to go  
17 around and just from your perspective when you think about  
18 this homework assignment you're going to have, and that's  
19 like looking at Title 17, looking at the concepts that  
20 different groups are going to put forth for you to review,  
21 what do you think are the most important things you'd like  
22 to make sure you keep in mind or you'd ask other people to  
23 keep in mind as they look at them, as they make that  
24 comparison between the concepts that are proposed and the  
25 Title 17 regulations?

1           Anybody have anything they'd like to say about  
2 that? Because this is big change and we have different  
3 levels of information and understanding at this table and  
4 different areas of expertise?

5           COMMITTEE MEMBER ZIELENSKI: I'd like as many  
6 different sources with respect to the potential  
7 development of regulations that I can be informed, so I  
8 can consider -- and again, I'm not a scientist and what  
9 we're talking about here is fairly technical stuff. The  
10 more information that I have, the more that I have to  
11 compare and contrast, the more likely it is that I think  
12 I'm going to be able to come to a reasoned, intelligent  
13 decision in terms of what regulations ought to be  
14 implemented.

15           So the more the merrier for me in terms of  
16 background information.

17           COMMITTEE MEMBER WONG: With regards to that it's  
18 been brought up on a couple of occasions for background  
19 information. And to kind of get everybody on the  
20 Committee as well as the public on the same foot, many of  
21 the laboratories in California are ASCLD/LAB accredited.  
22 And ASCLD/LAB stands for the American Society of Crime Lab  
23 Directors Laboratory Accreditation Board.

24           And what they do is they're an oversight private  
25 organization which looks at a laboratory's procedures,

1 their personnel, their training records, proficiency.  
2 Basically, they ensure quality and quality work coming out  
3 of the crime lab.

4 Now, looking at Title 17, Title 17 looked at and  
5 addressed maintaining quality control and forensic alcohol  
6 analysis within the state of California. Title 17 only  
7 applies and apply to public forensic laboratories. It did  
8 not apply to private laboratories, such as Torr discussed  
9 that if some guy wanted to start a rogue lab, and start  
10 putting out forensic alcohol analysis results, he or she  
11 could and would not be mandated to be covered under Title  
12 17. So Title 17 only covered public forensic  
13 laboratories.

14 As it stands now, there are only 2 laboratories  
15 in the state of California that are non-ASCLD accredited  
16 labs. And they -- public labs. And they are currently in  
17 the process of becoming ASCLD accredited as we speak.

18 So what happened was as these laboratories were  
19 becoming ASCLD accredited and also following Title 17  
20 regulations in the California Administrative Code, there  
21 was a lot of duplicativeness between Title 17 procedures  
22 and requirements and the ASCLD/LAB requirements. So  
23 Senate Bill 1623 what it basically did was it basically  
24 said let's just kind of go with one of these since you  
25 guys are having to do the same things for both of them

1   anyway in large part and parcel.

2               COMMITTEE MEMBER TANNEY:   That goes to the not  
3   the method of the testing but rather who is providing the  
4   oversight, whether it be ASCLD or DHS, right?

5               COMMITTEE MEMBER WONG:   Correct, but the  
6   ASCLD/LAB also does look at the procedures and inspections  
7   and all those things as well.

8               COMMITTEE MEMBER TANNEY:   Right, okay.

9               COMMITTEE MEMBER LOUGH:   But the new law does not  
10   require that a laboratory be ASCLD accredited.

11              COMMITTEE MEMBER SEDGWICK:   I'd like to add  
12   something to what Kenton said.   When Title 17 was  
13   originally written, it specifically targeted laboratories  
14   doing alcohol analysis for measurement for prosecutory  
15   purposes.   Far and away the majority of these are public  
16   laboratories, but we do have some private laboratories out  
17   there doing that under contract to police agencies.   They  
18   are Title 17 accredited.   They have to follow Title 17.

19              It's the non-Title 17 laboratories doing defense  
20   reanalysis or any other kind of alcohol analysis that do  
21   not -- for DUI purposes that don't have to follow Title  
22   17.   I don't see changing that.   That's a very substantive  
23   change in the law and circumvents the initial intent of  
24   Title 17.

25              COMMITTEE MEMBER LOUGH:   And that's stated -- it



1 still says the same thing?

2 COMMITTEE MEMBER SEDGWICK: Yes.

3 CHAIRPERSON KIMSEY: That was not changed in the  
4 law.

5 COMMITTEE MEMBER LOUGH: No.

6 FACILITATOR ABINADER: Any other thoughts about  
7 what folks should keep in mind or any other additional  
8 information that you may need to be able to do this  
9 comparison between Title 17 and the new -- and the  
10 proposals that you'll see from different groups?

11 CHAIRPERSON KIMSEY: Is there a timing on when --  
12 obviously I imagine Patty's package of information will  
13 come electronically as fairly close to being ready, if not  
14 ready. Do we want to set some sort of timeframe? I mean,  
15 if there are going to be other, you know, concepts coming  
16 from other organizations, what's a reasonable timeframe or  
17 is there -- is that --

18 COMMITTEE MEMBER SEDGWICK: Let me speak for the  
19 California Association of Toxicologists. My job over  
20 since November was to read what the working group put  
21 together and some ideas they had, moderated a group on  
22 March 10th, went through some roundtable discussions on  
23 March 12th, and basically I listened to an incredible  
24 number of divergent opinions with an emphasis on  
25 divergent. And I wrote them down and made a report.

1           We did not rewrite Title 17. We did not put out  
2 proposals. Some of the people we had there, some of the  
3 moderators, did do that for their particular areas.

4           I don't have a specific direction from the CAT.

5           CHAIRPERSON KIMSEY: Do you think some of that  
6 information would be helpful for us?

7           COMMITTEE MEMBER SEDGWICK: Well, it's available.

8           CHAIRPERSON KIMSEY: I mean even if it is a  
9 little bit disjointed or --

10          COMMITTEE MEMBER SEDGWICK: No, it's available on  
11 the website on the CAT website I don't know if it's  
12 limited to numbers or not, but I can certainly make that  
13 report available to everybody here. It is disjointed,  
14 yes.

15          CHAIRPERSON KIMSEY: I think that would be -- I  
16 would find that helpful.

17          FACILITATOR ABINADER: I think anything that  
18 gives people a sense about the issues that they need to  
19 think about, the implications. I mean, we tried to talk  
20 about it today, but we really don't have enough  
21 information around the room. But that's the kind of  
22 things, to make a comparison, you have to -- what are you  
23 basing your comparison on, because it sounds good?

24          I mean, and those are the kinds of things that we  
25 need to really think about, what are the implications of

1 it, in terms of the assurance, accountability, competence,  
2 all those things that you all brought up as being very  
3 key, and, you know, really respecting and reflecting the  
4 intent of the law, which I'm sure the proposals do.

5 CHAIRPERSON KIMSEY: Do the criminalists have  
6 some?

7 COMMITTEE MEMBER WONG: Yes, we do. If I can add  
8 on to what Paul said. In general, I think when we look at  
9 all this data, we're going to find many areas of  
10 commonality that everyone is addressing and seeing the  
11 same things.

12 CHAIRPERSON KIMSEY: And does your group have  
13 something in a reasonable timeframe that we could look at?

14 COMMITTEE MEMBER WONG: Yes. It's not -- we have  
15 not rewritten or tried to rewrite Title 17, but ours is in  
16 a disjointed --

17 CHAIRPERSON KIMSEY: In a similar format. And  
18 that's already ready. So theoretically by the end of next  
19 week we might all have that information.

20 COMMITTEE MEMBER SEDGWICK: Just tell us where to  
21 send it.

22 FACILITATOR ABINADER: And is there anything that  
23 would come from DHS?

24 CHAIRPERSON KIMSEY: No, I don't think we have --  
25 if we do, we will meet whatever timeframe you want us to

1 meet. We're talking about the end of next week, we  
2 would -- if we have something, we'll get it out.

3 COMMITTEE MEMBER TANNEY: And I'd like people to  
4 consider the applicable code sections. I don't know -- I  
5 mean those are public records. I don't know if they need  
6 to be posted or anything, but --

7 CHAIRPERSON KIMSEY: That's an area, I think, we,  
8 DHS, may have very little knowledge of or -- actually, I  
9 shouldn't say -- well, is there a way of -- can you get  
10 something -- do you have that?

11 COMMITTEE MEMBER TANNEY: I can send that to you.

12 FOOD AND DRUG LABORATORY BRANCH CHIEF SOLIMAN: I  
13 have a question. What is required with the ASCLD/LAB  
14 accreditation? Could you please describe what it takes  
15 for a laboratory to be accredited by this body?

16 COMMITTEE MEMBER WONG: The process is fairly  
17 rigorous. Your laboratory has to submit procedures and  
18 methods for all different types of analysis. And these  
19 all get reviewed by the Laboratory Accreditation Board.  
20 They are looking for quality control, qualifications for  
21 personnel, proficiency testing, blind testing. They come  
22 in and they look at your physical plant as well. They do  
23 physical inspections.

24 You're required as an ASCLD/LAB accredited  
25 laboratory to do a self-audit to make sure that you're

1 doing all your proficiency testing and all your  
2 inspections of your physical plant to make sure that  
3 there's security, and change of custody of evidence and  
4 all those certain things, and things are packaged  
5 properly, so that there's no question of any breeches for  
6 responsibility.

7 And then the laboratory also is physically  
8 inspected by ASCLD/LAB accreditation board every 5 years.

9 COMMITTEE MEMBER LOUGH: Every 5 years?

10 COMMITTEE MEMBER WONG: They descend on your  
11 laboratory and pick your place apart. And they go through  
12 all your instrumentation to make sure that if you say that  
13 you're doing your quality checks on your instrument that  
14 you are indeed doing that. And they check to make sure  
15 that people are doing their proficiency testing and that  
16 you are having security. And that they go through your  
17 evidence vaults and make sure that everything is safely  
18 secured and that chain of custodies are signed. And it's  
19 fairly rigorous.

20 CHAIRPERSON KIMSEY: And they have, as I would  
21 imagine, a website that you can look at.

22 COMMITTEE MEMBER WONG: Yes, they do.

23 CHAIRPERSON KIMSEY: So just to sort of help  
24 clarify, you'll be able to send -- and who should they  
25 send it to? I'm just trying to think who people should --

1 sort of the coordinating entity here, I guess is the  
2 Department. I guess -- I'm looking around the room. I  
3 guess we've been having the -- Mary has been sending out  
4 the communications. So why don't we have you get the  
5 information to Mary. And then Mary can get it out. And  
6 her E-mail address would be msoliman@dhs.ca.gov.

7 Other items that we might want to pull together  
8 for all of our review? We're going to get the other  
9 citations or codes from Laura. Other groups are going to  
10 be providing the documentation -- or some sort of  
11 documentation, either actual revisions to the regulations,  
12 suggestions or summaries of discussions from their various  
13 organizations.

14 COMMITTEE MEMBER SEDGWICK: Would it be  
15 appropriate or reasonable or even easy to get ASCLD/LAB  
16 inspection criteria, quality assurance definitions? I'm  
17 an ASCLD/LAB inspector. I inspect laboratories, and I  
18 have copies of this. But it might be more appropriate to  
19 get it directly from the Lab Accreditation Board.

20 CHAIRPERSON KIMSEY: Is it something they have on  
21 their website?

22 COMMITTEE MEMBER SEDGWICK: I don't know.

23 COMMITTEE MEMBER TANNEY: I think I've looked  
24 them up when I was looking at the Senate Bill and  
25 researching that. I think I looked up their website and

1 found it, but I'm not positive.

2 CHAIRPERSON KIMSEY: Why don't we each sort of  
3 look at the website. And if we think that there's  
4 information that we would need at a subsequent time, then  
5 we can make arrangements to get it.

6 Any other comments before we go to the public for  
7 comment?

8 COMMITTEE MEMBER LOUGH: When were we going to  
9 determine rescheduling? Yeah, that's -- we'll sort of do  
10 that after the public comment. We have governance  
11 discussion, meeting process, and we'll talk about when we  
12 want to meet again.

13 Any comments from the public at this point?

14 MR. ZEHNDER: Jeff Zehnder, Drug Detection Lab  
15 Sacramento.

16 I have a little concern about the neutrality of  
17 the oversight. And maybe I don't understand everything  
18 that's happened here with the change in the law, but it  
19 seems to me that this was really all about taking the  
20 oversight away from DHS and giving it to ASCLD.

21 Well, I have one of the private laboratories that  
22 was licensed under Title 17 for 20 years until January  
23 1st. And I have a little problem if ASCLD is going to  
24 be having oversight of my lab. ASCLD is the Association  
25 of Crime Lab -- American Society of Crime Lab Directors.

1 That means that it's strictly a prosecution oriented  
2 organization.

3 And this is an adversarial system. And God bless  
4 us for that. I think it's the power and the glory of our  
5 whole legal system is in the adversarial aspect of it.

6 So I guess my only concern here is that labs like  
7 mine, which are fully qualified to be doing this work as  
8 well, could be subject to oversight by somebody who has a  
9 dog in the fight, if you will. And I don't think that  
10 that's right, just in -- now, maybe there could be some  
11 clarification on this. Maybe I don't know exactly who  
12 ASCLD is or where their loyalties lie, but somebody said  
13 something about the fox watching the hen house. And  
14 that's what it appears to be to me.

15 CHAIRPERSON KIMSEY: Thank you for the comment.

16 Another comment?

17 MS. WEINGARTEN: My name is Halle Weingarten.  
18 And for 22 years I was at the crime lab in San Jose. I've  
19 been in private practice for 10 years. So I feel like I  
20 come with kind of a balanced position seeing both sides of  
21 the issues.

22 But I have several concerns about things that  
23 were said today or maybe not said today that should have  
24 been said today.

25 First, I think you have to recognize that in most



1 counties in California well over 90 percent, probably  
2 somewhere around 98, 99 percent of DUIs plead guilty.  
3 Those guilty pleas are based, for the most part, on the  
4 fact that they know, they've had confidence up to this  
5 point, that the alcohol levels being reported were  
6 accurate and that the whole procedure was done correctly.

7           And that is due to the rigorous oversight of the  
8 Health Department. And I'm not going to pretend that I  
9 didn't -- when I was running the alcohol program in Santa  
10 Clara county, I'm not going to pretend that I didn't chafe  
11 or disagree with DHS frequently.

12           But on the other hand, there were a number of  
13 advantages to having that oversight. And I think that  
14 eliminating that oversight is a huge mistake. It will  
15 create more problems for crime labs than it will solve.

16           Many people don't have money for attorneys. And  
17 so they will just plead guilty. And again this goes back  
18 to the issue of is the result reliable and are we being  
19 fair to the public. I think that's a big issue.

20           Public defenders for indigent people, indigent  
21 DUI defendants, public defender's office is for the most  
22 part urge, if you will, their clients to plead guilty,  
23 because they are generally not staffed to handle the load.  
24 That was one issue.

25           There seems to be some thought that proficiency

1 testing will take care of ensuring reliability of testing.  
2 There is no proficiency testing at all involved in running  
3 a breath testing program not of any kind.

4 In addition, proficiency tests come to the  
5 laboratory in open forum. In other words, everybody knows  
6 its a proficiency test. So a more effective way of  
7 handling the proficiency testing problem would be to have  
8 blind proficiency submitted. Everybody groans whenever I  
9 suggest that. But in the federally certified laboratory  
10 system, blind proficiencies are required. And there are  
11 mechanisms for setting up submission of blind proficiency  
12 samples to crime labs. This could be done, and this would  
13 certainly have more of an effect on ensuring the accuracy  
14 and fairness of testing.

15 There were also statements made about private  
16 labs. And although it may not be common knowledge, there  
17 are at least 6 private laboratories in this state, which  
18 have been licensed to perform forensic alcohol tests.  
19 They do it -- contrary to what has been said, they do --  
20 some of them do a huge volume, because they contract with  
21 many, many, many agencies, and they do testing on tens of  
22 thousands of blood alcohol samples a year.

23 ASCLD is not the only certified agency that would  
24 be appropriate for this type of work. Toxicology  
25 associations, namely the American Association of Forensic

1 Sciences and Society of Forensic Toxicologists have a  
2 joint accreditation program for toxicology laboratories.  
3 Blood alcohol is certainly considered a toxicology type of  
4 analysis.

5           So there are other types of accreditations  
6 available which would be more appropriate for some  
7 laboratories, which are not crime laboratories. These are  
8 laboratories which specialize in toxicology and blood  
9 alcohol testing. And those certifications would certainly  
10 be appropriate when many of them are much more rigorous  
11 than ASCLD accreditation.

12           So I would like to suggest other types  
13 certifications if we're going to go away from oversight by  
14 the Department of Health Services, that we move away from  
15 ASCLD as well. I agree with what Jeff said about the fox  
16 and the hen house. I think it's probably not the best way  
17 of being able to defend your work.

18           Over break I was talking with a couple people  
19 from crime labs who are very concerned. And one of them  
20 has left. They're very concerned that in a laboratory  
21 with a small program that when they have very little  
22 resources allocated to their alcohol program, this is  
23 going to create a huge burden, because taking the  
24 oversight away from the Health Department is going to mean  
25 that each laboratory will have responsibility for

1 producing discovery. And this could amount to stacks and  
2 stacks of records, producing the copies, mailing out many,  
3 many records that currently now the Health Department has  
4 been handling.

5           So I think that there is -- what I'm hearing is  
6 that there is a concern that this type of change is going  
7 to put a much larger burden on the laboratories in other  
8 ways than just having to go to court. More often, which I  
9 think we recognize, and to defend what you're doing in  
10 great detail, rather than just being able to say as we did  
11 for many years of at the crime lab, hey my lab is  
12 licensed, we're all certified, we're good to go. And it  
13 was always accepted. That's going to change.

14           CHAIRPERSON KIMSEY: Thank you for your comments.

15           Any other public comment?

16           MR. PHILLIPS: My name is Bill Phillips. I'm the  
17 laboratory director with the California Department of  
18 Justice. I run the toxicology and blood alcohol programs.  
19 There was some misinformation given today, and I'd like to  
20 straighten that out concerning the qualitative or  
21 quantitative analysis of forensic science in forensic  
22 science.

23           The DNA program, which is right down the road  
24 here, with the California Department of Justice would  
25 seriously disagree with the qualitative and quantitative

1 ability of forensic science, and also the toxicology  
2 laboratory. We do quantitative analysis on a daily basis  
3 at levels of parts per billion. And we can significantly  
4 disagree with the opinion.

5 And alcohol of course the .08 analysis of alcohol  
6 is a simple process. We would like to be able to make it  
7 more understandable to the Department of Health so that we  
8 can better regulate our own business.

9 Thank you.

10 CHAIRPERSON KIMSEY: Thank you.

11 Any other comments?

12 Okay.

13 Oh, there is one. There's a spotlight in my eye.

14 MS. HEUER: My name is Gail Heuer. I work with  
15 the Department of Motor Vehicles. I'm their senior staff  
16 counsel there. I'm the lead attorney for driver safety  
17 and driver's licensing issues.

18 And I want very much to be a part of this  
19 process, in that, our Department is a big enduser for  
20 Title 17. What you're going to do at that table is going  
21 to affect our driver safety programs hugely. We are  
22 expending a great deal of money now defending things that  
23 we didn't used to need to defend, because of the state of  
24 flux of Title 17 at present.

25 So I urge your prompt work on this revision. And

1 I volunteer in any way, shape or form that I can help with  
2 comments and so forth presenting DMV's point of view.

3 CHAIRPERSON KIMSEY: Thank you. Yes.

4 DR. LEMOS: My name is Nikolas Lemos. I am the  
5 Chief Forensic Toxicologist for a public lab at the Office  
6 of the Chief Medical Examiner in San Francisco. We do all  
7 the blood and urine DUIs in the county of San Francisco.

8 I am concerned right now that as it stands  
9 there's no opportunity for transparency of the analytical  
10 methods used in laboratories. The methods are not on  
11 record with anybody, and nobody really has the chance to  
12 peer review.

13 This is a basic scientific method principle. And  
14 we have to make sure that whatever comes out of your  
15 discussions and decisions includes that basic scientific  
16 principle of peer review.

17 Also, we have to decide that many -- or you have  
18 to decide, but many facilities here feel uncomfortable  
19 able, including my public laboratory that I represent, to  
20 be perceived to be certified by the American Society of  
21 Crime Lab Directors. Because like many other speakers  
22 have said or many other members of the public have said  
23 that comes with a certain label.

24 We treat forensic alcohol like any other forensic  
25 determination in the laboratory. And at the American

1 Board of Forensic Toxicology, Society for Forensic  
2 Toxicologists and many other professional bodies would be  
3 able to give you guidance as to how it is that every  
4 forensic determination should be performed in a  
5 laboratory.

6 I feel that if you actually have the decision or  
7 if you make the decision that this should be ASCLD  
8 related, then I will be going to court a lot as a  
9 prosecution witness, which I am not. I am an independent  
10 expert giving my scientific opinions based on  
11 scientifically proven methods.

12 Thank you.

13 CHAIRPERSON KIMSEY: Thank you.

14 Other comments?

15 Okay. The next part of our agenda is the  
16 governance and meeting process. We can talk about the  
17 Committee structure, leadership, responsibilities, when we  
18 want to meet next, what our timeframes are.

19 I think our structure is pretty well set.  
20 There's 8 of us. And the Department has asked me, at  
21 least for today's meeting, to be the Chair. And that's  
22 sort of up to the group if we want to elect a chair. I  
23 mean it's a fairly nominal position as we're imposing it  
24 so to speak, to sort of keep us on an agenda and that sort  
25 of thing and doesn't really -- everybody's vote is still

1 the same. The chair doesn't break a tie. But that's up  
2 to the group.

3 And when do we want to meet next? What do the  
4 frames allow.

5 COMMITTEE MEMBER LOUGH: Thirty days.

6 CHAIRPERSON KIMSEY: Meet again in 30 days.  
7 We'll try and get as much information together and out to  
8 everybody by the end of next week. We need to meet in 30  
9 days, we're looking towards the end of September.

10 What we'll do is we can send out an E-mail to the  
11 Committee and look at people's schedules. Does a  
12 telephone conference set up suffice?

13 COMMITTEE MEMBER TANNEY: It's my understanding  
14 that we would each then have to be in a public room, is  
15 that with the public invited or --

16 CHAIRPERSON KIMSEY: I believe that's the case.

17 SENIOR STAFF COUNSEL ENG: Correct.

18 COMMITTEE MEMBER TANNEY: I'll have to look at  
19 the feasibility of that.

20 CHAIRPERSON KIMSEY: There's another. Some of  
21 you are closed together and you can get into together in a  
22 public building -- not that close?

23 FACILITATOR ABINADER: It would be great if --  
24 particularly since you're going to be reviewing concepts  
25 and talking about implications of those concepts, is it



1 possible to meet face to face or is it hard?

2 I mean, what is the pleasure of the Committee?

3 CHAIRPERSON KIMSEY: I think there's some  
4 advantages obviously meeting face to face, you know. It's  
5 just timeframes.

6 COMMITTEE MEMBER SEDGWICK: The only disadvantage  
7 in meeting face to face is it takes us all day. But the  
8 alternatives are virtually impossible. At least, I don't  
9 know how I can manage that.

10 COMMITTEE MEMBER TANNEY: Well, also the cost --  
11 I mean it's not just the taking all day, it's the costs  
12 involved in travel. But I don't know what the  
13 feasibility -- I mean, I would have to investigate the  
14 feasibility of a teleconference or video conference  
15 option, which is difficult.

16 CHAIRPERSON KIMSEY: There's nothing wrong  
17 with -- from the Department's perspective in coming here  
18 again. If you wanted to do something in southern  
19 California, I'm sure the State has office buildings  
20 fairly -- that we could use in southern California.

21 But we could try and meet back here in a month if  
22 that -- since we all know where it is now. And why don't  
23 we tentatively -- and, of course, this Committee can  
24 change it, but it will posted. But why don't we  
25 tentatively set up that we would meet again in

1 approximately a month back here. People might look into  
2 their options of doing a telecon in some sort of public  
3 environment. But right now it looks like we're headed  
4 back to another face-to-face meeting here toward the end  
5 of September.

6 Any feelings about the chairmanship issue?

7 (Laughter.)

8 CHAIRPERSON KIMSEY: I guess that's -- other  
9 items we want to discuss before we close the meeting?

10 COMMITTEE MEMBER LOUGH: Just a comment for the  
11 general public. This isn't a group of ASCLD people. This  
12 is a group of people representing various organizations.  
13 So make sure that those of you who are working in certain  
14 fields that have a certain opinion that you contact these  
15 associations that you should have representatives going to  
16 those meetings so that you can make sure your voice is  
17 heard.

18 But we don't want anyone to confuse the fact that  
19 we're talking about setting a proficiency test program  
20 similar to ASCLD/LAB that we are an ASCLD organization or  
21 requiring any laboratory to become accredited. We are  
22 not.

23 CHAIRPERSON KIMSEY: And from the Department's  
24 perspective, we're very much interested in input from any  
25 organization. You can contact, you know, people on this

1 Committee. You can always contact me. We very much need  
2 to know the consequences of actions the Department is  
3 going to be involved in.

4           So please do not hesitate, if you have public  
5 comment or talking with anybody on the Committee, to make  
6 your opinions known. If there's nobody on the Committee,  
7 you can always talk with the Department, and I would be  
8 that sort of point person. You can get to me through Mary  
9 Soliman or my own E-mail address. Although I have 700  
10 currently unread.

11           (Laughter.)

12           FACILITATOR ABINADER: And yours could be 701.

13           CHAIRPERSON KIMSEY: That's not to say that I  
14 won't get to them by tomorrow. But it's  
15 pkimsey@dhs.ca.gov. But you can also get in touch with  
16 Mary Soliman. pkinsey@dhs.ca.gov.

17           Other comments or items?

18           If not --

19           COMMITTEE MEMBER TANNEY: I'm sorry. Just for  
20 clarification on contact with the public, are there any  
21 limitations on individual members of the Committee with  
22 respect to communications with the public regarding any of  
23 these issues?

24           CHAIRPERSON KIMSEY: I believe as an individual  
25 there are none, but -- is that correct?

1 SENIOR STAFF COUNSEL ENG: That's correct.

2 COMMITTEE MEMBER ZIELENSKI: They can talk to us,  
3 but we can't solicit them, is that how it works?

4 SENIOR STAFF COUNSEL ENG: There really isn't a  
5 limitation on committee members talking to individual  
6 members of the public.

7 CHAIRPERSON KIMSEY: So you can solicit or you  
8 can be approached.

9 Okay. Well thank you all very much for coming  
10 today. And good luck on your travels.

11 (Thereupon the California Department of  
12 Health Services, Forensic Alcohol Review  
13 Committee meeting adjourned at 3:00 p.m.)

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## 1 CERTIFICATE OF REPORTER

2 I, JAMES F. PETERS, a Certified Shorthand  
3 Reporter of the State of California, and Registered  
4 Professional Reporter, do hereby certify:

5 That I am a disinterested person herein; that the  
6 foregoing California Department of Health Services,  
7 Forensic Alcohol Review Committee meeting was reported in  
8 shorthand by me, James F. Peters, a Certified Shorthand  
9 Reporter of the State of California, and thereafter  
10 transcribed into typewriting.

11 I further certify that I am not of counsel or  
12 attorney for any of the parties to said meeting nor in any  
13 way interested in the outcome of said meeting.

14 IN WITNESS WHEREOF, I have hereunto set my hand  
15 this 6th day of September, 2005.

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